Supreme Court, U. S.
FILED
NOV 10 1973
MICHAEL RODAK, JR., CLERK

73-762

IN THE SUPREME COURT OF THE UNITED STATES

CAROL MAUREEN SOSNA, on behalf of herself and all others similarly situated, Plaintiff, vs. THE STATE OF IOWA, and A. L. KECK, individually, and as Judge of the District Court of the State of Iowa in and for Jackson County, Defendants.	JURISDICTIONAL STATEMENT

James H. Reynolds

Paul E. Kempter

Fred H. McCaw

Attorneys for Appellant
630 Fischer Building
Dubuque, Iowa 52001
(319) 588-4655

I

A. The memorandum opinion and order entered on July 16, 1973, by a three-judge court convened in the Northern District of Iowa is attached hereto as Appendix A and made a part hereof. The opinion was reported at 42 U.S.L.W. 2086 and 360 F. Supp. 1182.

B. The memorandum ruling on a special appearance entered on December 27, 1972, by Judge A. L. Keck of the District Court of Iowa in and for Jackson County is attached hereto as Appendix B and made a part hereof.

II

A. This appeal is taken from an order of a three-judge court denying Appellant's application for declaratory and injunctive relief. The three-judge court was convened upon Appellant's application in the U.S. District Court for the Northern District of Iowa based upon 28 U.S.C. §§ 2281 and 2284 and pursuant to an order of Chief Judge Matthes of the Eighth Circuit Court of Appeals dated January 26, 1973.

This appeal is brought pursuant to 28 U.S.C. § 1253, allowing a direct appeal to the Supreme Court where a three-judge court issues a final order denying a permanent injunction in a civil action required to be heard by a three-judge court. Here, 28 U.S.C. § 2281 required a three-judge court because the Appellant was seeking to have enjoined the

enforcement of a state statute on the ground that it is unconstitutional.

B. Appellant seeks review of an order entered in the U.S. District Court for the Northern District of Iowa on July 16, 1973, at 1:00 p.m. by the three-judge court, Chief Judge McManus dissenting. Notice of Appeal was filed in the U.S. District Court for the Northern District of Iowa on September 13, 1973.

C. Jurisdiction of this appeal is conferred upon the Supreme Court by 28 U.S.C. § 1253.

D. The following cases are believed to sustain the Supreme Court's jurisdiction of this appeal:

Goldstein v. Cox 396 U.S. 471, 24 L. Ed. 2d 663, 90 S. Ct. 671 (1970).

Flast v. Cohen 392 U.S. 83, 20 L. Ed. 2d 947, 88 S. Ct. 1942 (1968).

Colman v. Miller 307 U.S. 433, 83 L. Ed. 1385, 59 S. Ct. 972 (1939).

E. The validity of the following sections of the Code of Iowa are involved:

> 598.6 "Additional contents. Except where the respondent is a resident of this state and is served by personal service, the petition for dissolution of marriage, in addition to setting forth the information required by section 598.5, must state that the petitioner has been for the last year a resident of the state, specifying the county in which the petitioner has resided, and the length of such residence therein after deducting all absences from the state; and that the maintenance of the residence has been in good faith and not for the purpose of obtaining a marriage dissolution only."
> Code of Iowa § 598.6 (1973), Volume II, page 2906.
>
> 598.9 "Residence--failure of proof. If the averments as to residence are not fully proved, the hearing shall proceed no further, and the action be dismissed by the court."
> Code of Iowa § 598.9 (1973), Volume II, page 2907.

III

QUESTIONS PRESENTED BY THE APPEAL

A. Do Sections 598.6 and 598.9 of the Code of Iowa present an unconstitutional infringement upon the appellant's Fourteenth Amendment right to equal protection of the laws by creating a discriminatory classification which has the effect of penalizing her fundamental right of free interstate migration and which is not justified by a compelling state interest?

B. Do Sections 598.6 and 598.9 of the Code of Iowa present an unconstitutional infringement upon the rights guaranteed to the Appellant by the First Amendment and the Due Process Clause of the

Fourteenth Amendment by denying access to the courts through an irrebuttable presumption of law which is overbroad in its reach and which is not justified by a state interest of overriding signifcance?

IV

STATEMENT OF THE CASE

The appellant, Carol Maureen Sosna, is presently a resident of Green Island, Jackson County, Iowa. She has resided there since August, 1972, prior to which she resided in the State of New York. She was married to Michael Sosna on September 5, 1964, in the State of Michigan.

In September, 1972, appellant instituted marriage dissolution proceedings against Michael Sosna, a resident of New York, in the District Court of Iowa, Jackson County, pursuant to Chapter 598 of the Code of Iowa. Personal service was obtained upon Michael Sosna while he was temporarily present in Iowa.

Section 598.6 of the Code of Iowa requires a one-year Iowa residency by a non-resident. By order dated December 27, 1972, District Judge A. L. Keck, a co-appellee herein, in a ruling on a special appearance of the respondent, dismissed the petition pursuant to Section 598.9 of the Code of Iowa for want of jurisdiction.

Appellant brought a class action pur-

suant to Rule 23 of the Federal Rules of Civil Procedure seeking to have Sections 598.6 and 598.9 declared unconstitutional as violative of her rights under the First and Fourteenth Amendments to the U.S. Constitution. Appellant also asked for a permanent injunction against further enforcement of Sections 598.6 and 598.9

A three-judge district court was convened to consider the merits of the cause pursuant to 28 U.S.C. S 2281. By order dated July 16, 1973, and signed by Circuit Judge Roy L. Stephenson and Chief District Judge William C. Hanson, with Chief District Judge Edward J. McManus dissenting, Appellant's complaint was dismissed. Thereafter, on September 13, 1973, Appellant filed Notice of Appeal to the Supreme Court.

V

SUBSTANTIALITY OF THE QUESTIONS

This appeal presents substantial questions concerning the validity of a state statute under the United States Constitution. The appeal arises out of a controversy between the parties with regard to the operation and effect of sections of the U.S. Constitution. The Appellant claims a right which will be denied if the Constitution is given the construction asserted by the Appellees and which will be granted if the construction asserted by the Appellant is applied. Denial of

the claimed right affects the Appellant in a material, personal, significant way, and the appeal is pursued in good faith.

The questions presented are not foreclosed from controversy by prior decisions of the Supreme Court. The significance of the questions is demonstrated by the number of conflicting lower court decisions involving substantially similar state statutes and substantially similar assertions of Constitutional construction. See, for example, Wymelenberg v. Syman 328 F. Supp. 1353 (E.D. Wisconsin, 1971), Larson v. Gallogly 361 F. Supp. 305 (D. Rhode Island, 1973), Mon Chi Heung Au v. Lum Civil No. 72-3588 (D. Hawaii, filed June 19, 1969), all holding divorce residency requirements unconstitutional. See also Davis v. Davis 210 N.W. 2d 221 (Sup. Ct. Minnesota, 1973), Shiffman v. Makres (M.D. Florida, filed June 1,1973), holding divorce residency requirements constitutionally valid.

In addition, there are recent Supreme Court decisions which have the effect of bringing into question the validity of many state residency requirements. Shapiro v. Thompson 394 U.S. 618, 89 S.Ct. 1322 (1969), Dunn v. Blumstein 405 U.S. 330, 92 S.Ct. 995 (1972). In Shapiro, the Court expressly stated:

> "We imply no view of the validity of waiting-period or residence requirements determining eligibility to vote, eligibility for tuition free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel." 394 U.S. 618, 638 n.21; 89 S.Ct. 1322, 1333 n.21.

As a result, significant liberties are in doubt; and prior Supreme Court decisions offer promise to litigants pursuing these liberties without offering direction to the courts.

Respectfully submitted

James H. Reynolds
Paul E. Kempter
Fred H. McCaw

Attorneys for Appellant
630 Fischer Building
Dubuque, Iowa 52001
(319) 588-4655

APPENDIX A

Opinion of three judge-court entered in

U.S. District Court for the Northern

District of Iowa on July 16, 1973, at

1:00 p.m.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

CAROL MAUREEN SOSNA, on behalf of herself and all others similarly situated,	)	
Plaintiff,	)	
vs.	)	73-C-1002-ED
THE STATE OF IOWA, and A. L. Keck, individually and as Judge of the District Court of the State of Iowa in and for Jackson County,	)	
Defendants.	)	

Before STEPHENSON, Circuit Judge, McManus, Chief District Judge, and Hanson, Chief District Judge

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STEPHENSON, Circuit Judge.

Plaintiff, Carol Maureen Sosna, is presently a resident of Green Island, Jackson County, Iowa. She has resided there since August 1972, prior to which she resided in the State of New York. She was married to respondent, Michael Sosna, on September 5, 1964 in the State of Michigan.

In September 1972, plaintiff instituted marriage dissolution proceedings against respondent, a non-resident, in the District Court of Iowa, Jackson County, pursuant to Iowa Code Chapter 598. Iowa Code § 598.6 (1971), [1] requires a one year Iowa residency

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1. Iowa Code § 598.6 (1971) reads as follows:

"Except where the respondent is a resident of the state and is served by personal service, the petition for dissolution of marriage, in addition to setting forth the information required by section 598.5, must state that the petitioner has been for the last year a resident of the state, specifying the county in which the petitioner has resided, and the length of such residence

1. (cont'd)
therein after deducting all absences from the state; and that the maintenance of the residence has been in good faith and not for the purpose of obtaining a marriage dissolution only."

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by a petitioner when the respondent is a non-resident. By order dated December 27, 1972, the Honorable A. L. Keck, a co-defendant herein, in ruling on a special appearance of respondent, dismissed the petition pursuant to Iowa Code § 598.9 (1971) [2] for want of jurisdiction.

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2. Iowa Code § 598.9 (1971) reads as follows:

"If the averments as to residence are not fully proved, the hearing shall proceed no further, and the action be dismissed by the court."

Plaintiff now brings this class action pursuant to Fed. R. Civ. P. 23, and seeks to have §§ 598.6 and 598.9 (1971) declared unconstitutional as violative of her right to petition for redress of grievances under the First Amendment, [3] the Fourteenth Amendment, [4] and in violation of

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3. U. S. Const. Amend. I.
4. Id., Amend. XIV.

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her right to travel freely from one state to another insofar as it imposes a one year durational residency requirement. She also prays for an injunction against

its further applications. A three-judge district court was convened to consider the merits of this cause. See, 28 U.S.C. § 2281. [5]

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5. We note at the outset that determination of plaintiff's deferral period in August of 1973, would not render this case moot since the cause before us is a class action and the court is confronted with the reasonable likelihood that the problem will occur to members of the class of which plaintiff is currently a member. See Hall v. Beals, 396 U.S. 45, 48-49, 90 S. Ct. 200, 202 (1969); and compare with, Bailey v. Patterson, 369 U.S. 31, 32-33, 82 S. Ct. 549, 550 (1962); see also, Roe v. Wade, ____ U.S. ____, ____, 93 S. Ct. 705, 712-13 (1973).

"(D)urational residence laws must be measured by a strict equal protection test: they are unconstitutional unless the State can demonstrate that such laws are 'necessary to promote a compelling governmental interest.'" Dunn v. Blumstein, 405 U.S. 330, 342, 92 S. Ct. 995, 1003 (1972); Shapiro v. Thompson, 394 U.S. 618, 634, 89 S. Ct. 1322, 1331 (1969).

We are not dealing here with the right to vote nor the privilege to receive welfare as involved in Dunn, supra and Shapiro, supra. In Dunn, the Court held that a durational residency requirement imposed under Tennessee law which precluded newcomers from voting was not necessary to further a compelling state interest.

With emphasis placed upon the difference between bona fide residence requirements and durational residence requirements, the Court noted that new residents as a group may be less informed relative to state and local issues than older residents, and that durational residency requirements will exclude some uninformed new residents. It concluded, however, that " . . . as devices to limit the franchise to knowledgeable residents, the conclusive presumptions of durational residency requirements are much too crude. . . . They represent a requirement of knowledge unfairly imposed on only some citizens." The basic constitutional right to vote, therefore, could not be annulled where the "relationship between the state interest in an informed electorate" and the one year residency requirement demonstrated "simply too attenuated a relationship." Dunn v. Blumstein, supra, 405 U.S. 330, 359-60, 92 S. Ct. 995, ____ (1972).

In Shapiro, the Court noted that the record reflected "weighty evidence" that the main thrust of the durational residency requirement in issue was to exclude from that jurisdiction the poor who needed or would probably need relief. Shapiro v. Thompson, supra, 394 U.S. 618, 628, 89 S. Ct. 1322, 1328 (1969). In declaring the welfare residency requirement unconstitutional, the Court reasoned that implicit in any attempt to restrain potential welfare recipients from entering a state, when the motivating factor of the indigents is to seek higher benefits, is the notion that this class of indigents is "less deserving than indigents who do not take this consideration into account." Id. 394 U.S. 618, 631-32, 89 S. Ct. 1322, 1330. The net effect of the requirement

was the creation of two classes of indigents--the sole distinction being a residency requirement which denied the newcomers the very means to obtain their subsistence. Id., 394 U.S. 618, 627, 89 S. Ct. 1322, 1327.

Furthermore, the Court expressly stated in Shapiro that it did not purport to outlaw summarily all duration residency requirements.

> "We imply no view of the validity of waiting-period or residence requirements determing eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel." 394 U.S. 618, 638 n. 21, 89 S. Ct. 1322, 1333 n. 21."

Unlike voting or welfare, the concept of divorce is not a constitutional right, nor is it a basic necessity to survival. See, Whitehead v. Whitehead, 492 P.2d 939, 945 (Hawaii 1972); accord, Coleman v. Coleman, 291 N.E. 2d 530, 533 (Ohio 1972). Divorce is wholly a creature of statute, with the absolute power to prescribe the conditions relative thereto being vested in the state. [6] See, Pennoyer v. Neff, 95 U.S. 714, 734-35, ___ S. Ct. ___ (1877).

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6. See, Boddie v. Connecticut, 401 U.S. 371, 91 S. Ct. 780 (1971), in which the Supreme Court held that due process prohibits any state from denying

6. (cont'd)
indigents access to its divorce courts solely because of inability to pay court costs.

It is significant to note in this connection that the Iowa Dissolution of Marriage Act is based upon a "no-fault" concept of divorce. See, 20 Drake L. Rev. 211 (1971). While this innovative reform promotes a more harmonious dissolution of a marital breakdown, cf., In re Marriage of Williams, 199 N.W.2d 339, 342 (Iowa 1972), it was not the intent of the legislature to create in Iowa a virtual sanctuary for transient divorces based upon sham domiciles. To the contrary, Iowa law favors the preservation of marriage whenever possible, as evidenced by the ninety-day conciliation period of the new Iowa act. The period is mandatory unless waived by the court upon a showing of good cause. [7] Moreover, the deferral

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7. Iowa Code § 598.16 (1971).

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period may well foster a re-examination of marriage so that a couple might determine whether the move itself has helped restore tranquility to their estranged relationship. Place v. Place, 278 A 2d 710, 711-12 (Vt. 1971); accord, Coleman v. Coleman, supra, 29. N.E. 2d 530, 535 (Ohio 1972). It also serves to discourage Iowa from unnecessarily interfering with a marital relationship between non-residents in which it has no interest.

Based upon the foregoing, with particular consideration being given to the power of a state to regulate its own laws governing marriage and its dissolution, Pennoyer v. Neff, supra, 95 U.S. 714, 734-35, ___ S. Ct. ____ (1377); accord, Boddie v. Connecticut, supra, 401 U.S. 371, 376, 91 S. Ct. 780, 785 (1971), we are convinced that Iowa's interest in establishing a one-year deferral period [8] is sufficiently compelling to render §§ 598.6 and 598.9 of the

8. See, Whitehead v. Whitehead, supra, 492 P.2d 939, 948 (Hawaii 1972), insofar as it states that there is no material difference between the respective periods of residence prescribed by durational residency requirements whether the period be one year or ninety days. "If a prescribed period of one year discriminates against recent residents, so does a prescribed period of ninety days."

1971 Iowa Code constitutionally permissible. [9]

9. In Shapiro, supra, 394 U.S. 618, 630-31, 89 S. Ct. 1322, 1329 (1969), the Court stated that "(i)f a law has 'no other purpose * * * than to chill the assertion of constitutional rights by penalizing those who chose to exercise them, then it (is) patently unconstitutional.'" United States v. Jackson, 390 U.S. 570, 581, 88 S. Ct. 1209, 1216 (1968).

The Vermont court in Place v. Place, supra, 278 A.2d 710, 711 (vt. 1971), noted in response to the foregoing passage: "This is desparately thin guidance. A number of interstate differentials spring to mind that quite certainly chill change of residence, such as, for example, the presence of a state income tax, the measure of unemployment benefits, the extent of public supported education, to name but a few."

ORDER

IT IS ORDERED that plaintiff's complaint is dismissed with prejudice at plaintiff's costs.

/s/ Roy L. Stephenson, Circuit Judge

/s/ William C. Hanson, Chief District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

CAROL MAUREEN SOSNA, on behalf of herself, and all others similarly situated,	)	
Plaintiff,	)	No. 73-C-1002-ED
vs.	)	DISSENTING OPINION
THE STATE OF IOWA, and A. L. KECK, individually and as Judge of the District Court of the State of Iowa in and for Jackson County	)	
Defendants.	)	

McMANUS, C.J., DISSENTING:

I am compelled to dissent. In my view the majority's analysis of the constitutional issues involved is deficient. They incorrectly restrict the right to travel rationale, improperly apply the strict equal protection test and ignore the due process/access to the courts argument.

Citing Dunn v. Blumstein and Shapiro v. Thompson, supra, the majority concedes the durational residence requirements must be "measured by a strict equal protection test." From that point, however, the thrust of the opinion seems to be an attempt to distinguish the residence laws at issue in Dunn and Shapiro from that at issue here. Great emphasis is placed upon the fact that Dunn involved the right to vote and Shapiro the right to welfare benefits, while this case involves only divorce, "not a constitutional right, nor . . . a basic necessity to survival." The purpose of this distinction is unclear, but it appears to be a justification for utilizing some unidentified test, less stringent than strict equal protection. Although the majority does offer several purportedly "compelling" justifications for the discriminatory classifications inherent in section 598.6 of the Iowa Code, the record is devoid of evidence to support these justifications, since the state produced absolutely no evidence. See Dunn, supra, at 346. Also the majority never expressly recognizes the necessity for considering less onerous alternatives when applying the "strict equal protection test." Accordingly, I deem it necessary to set forth what I consider to be the appropriate constitutional analysis mandated by the relevant case law.

It can no longer be disputed that the right to unhindered interstate travel and settlement, in and of itself, is a fundamental right guaranteed by the constitution of the United States. Dunn v. Blumstein, supra, at 338 (1972); Oregon v. Mitchell, 400 U.S. 112, 237 (separate opinion of Brennan, White and Marshall, JJ.), 285-286 (Stewart, J., concurring and dissenting, with whom Burger, C.J., and Blackmun, J., joined) (1970). Shapiro v. Thompson, supra, at 629-631 (1969); United States v. Guest, 383 U.S. 745, 758 (1966). It is also clear that section 598.6 of the Iowa Code is a durational residence requirement which penalizes only petitioners who have recently exercised the right to interstate migration. The majority's attempt to distinguish Dunn and Shapiro seems unfounded in view of the explicit language in Dunn wherein the court stated that "whether we look to the benefit withheld by the classification (the opportunity to vote) or the basis for the classification (recent interstate travel) we conclude that the State must show a substantial and compelling reason for imposing durational residence requirements." Id, at 335.

The standard, therefore, that must be applied in determining the constitutionality of sections 598.6 and 598.9 of the Iowa Code (1971) is the strict equal protection test. Under this test the burden is on the state to demonstrate that (1) the classification serves a compelling state interest, and (2) that no less restrictive alternatives are available to the state. As the court stated in Dunn, "It is not sufficient for the State to show that durational residence requirements further a very substantial state interest.

In pursuing that important interest, the State cannot choose means that unnecessarily burden or restrict unconstitutionally protected activity." Id, at 343; see Oregon v. Mitchell, supra, at 237, 239; Shapiro v. Thompson, supra, at 634-638; N.A.A.C.P. v. Button, 371 U.S. 415, 438 (1962); Wymelenberg v. Syman, 329 F. Supp. 1353 (E. D. Wisc. 1971). See also Whitehead v. Whitehead, 492 P. 2d 939, 948 (1972) (Levinson, J., dissenting).

As the first "compelling" justification for section 598.6, the majority has found that it serves to prevent Iowa from becoming "a virtual sanctuary for transient divorces based upon sham comiciles." [1]

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1. The limited classification which § 598.6 creates also appears violative of the Equal Protection Clause due to its arbitrary imposition of a one-year residency requirement where the petitioner is a resident and the respondent is not, without imposing the same requirement in similar situations such as where the respondent resides in Iowa and the petitioner does not. See United States Dep't. of Agriculture v. Moreno, 41 L.W. 5105 (June 25, 1973). The arbitrariness of the scheme is illustrated by the ease with which divorces can be obtained under the present statute through the use of sham residences. For example, "if both parties desire the divorce and are willing to co-operate, it is possible to avoid the establishment of 'residence' in Iowa. . . . All that the parties need do is falsify their petition for divorce to the effect

1. (cont'd)
that the defendant is a resident of the state--a statement which the Iowa courts apparently are unwilling to scrutinize." Note, Some problems Under Iowa's Judicial Jurisdiction Statutes, 48 Iowa L. Rev. 968, 982 (1963). Additionally, without needing to falisfy the petition, the respondent could actually move into Iowa and the petitioner could immediately file for divorce even though not a resident. Thus, in addition to being violative of the Equal Protection Clause due to its arbitrariness, § 598.6 also appears to make Iowa subject to becoming a "divorce mill" even with its one-year residency requirement in the limited situation before the Court.

This finding completely avoids the basic issue. Admittedly, Iowa has a legitimate interest in not becoming a "divorce mill." The critical question, however, is whether this interest is served by denying bona fide residents of the state the right to seek a dissolution. [2] In creating an

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2. It is clear from the evidence that the plaintiff is a bona fide resident of the state and not here merely for the purpose of obtaining a marriage dissolution.

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irrebuttable presumption against recently arrived residents, the Iowa law sweeps too broadly since there are less restrictive

alternatives available to the state. In my opinion, the Iowa judiciary is perfectly competent to determine whether the residence of a petitioner has been maintained in good faith and not for the purpose of obtaining a dissolution. [3] Neither the

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3. Adequate protection would be afforded by limiting access to dissolution to those who are permanent or bona fide residents or domiciliaries of the state, meaning those physically present in the state with intent to make it their home. The burden to establish such would be on the petitioner. See Dunn, supra, at 343-54. "(S)uch objective indicia of bona fide residence as a dwelling, car registration, or drivers license," among other things, provide an adequate basis for a judicial determination of bona fide residence. Dunn, supra, at 352.

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specter of perjury nor the argument for administrative convenience is supportive of the majority's position or sufficient to justify the durational residence requirement in question. See Vlandis v. Kline, ____ U.S. _____, 41 L.W. 4796 (June 1973); Dunn, supra, at 345-54; Boddie v. Connecticut, 401 U.S. 371, 381-82 (1971); Shapiro, supra, at 633; Carrington v. Rash, 380 U.S. 89 (1965). As stated in Dunn, supra, at 352,

> "The State's legitimate purpose is to determine whether certain persons in the community are bona fide residents.

A durational residence requirement creates a classification that may, in a crude way, exclude non-residents from that group. But it also excludes many residents. Given the State's legitimate purpose and the individual interests that are affected, the classification is all too imprecise. . . . In general, it is not very difficult for Tennessee to determine on an individualized basis whether one recently arrived in the community is in fact a resident, although of course there will always be difficult cases. . . . But since Tennessee's presumption from failure to meet the durational residence requirements is conclusive, a showing of actual bona fide residence is irrelevant, even though such a showing would fully serve the State's purposes embodied in the presumption and would achieve those purposes with far less drastic impact on constitutionally protected interests."[4]

4. Although it has not been urged by the plaintiff, it appears that the "irrebuttable presumption" created by section 598.6 is also subject to attack on due process grounds in view of Vlandis v. Kline, supra. See also Stanley v. Illinois, 405 U.S. 645 (1972); Bell v. Burson, 402 U.S. 535 (1971); Heiner v. Donnan, 285 U.S. 312 (1932). Speaking for the majority, Justice Stewart found that a "permanent irrebuttable presumption of nonresidence . . . is violative of the Due Process Clause, because it provides no opportunity for students . . . to demonstrate that they have

4. (cont'd)
become bona fide . . . residents. The State can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates."

Although the "irrebuttable presumption" in this case is not permanent but only for one year, the state's denial of any opportunity to demonstrate bona fide residence appears violative of the due process clause in view of the other alternatives available to the state. See Dunn, supra, at 352.

With regard to the other reasons advanced by the majority in support of § 598.6, I am convinced that they do not serve any compelling state interest. Initially, the majority states that the one-year "deferral period may well foster a re-examination of marriage so that a couple might determine whether the move itself has helped restore tranquility to their estranged relationship." This reasoning, however, completely ignores the fact that § 598.6 requires a one-year residency of a petitioner only in the limited situation where the respondent does not reside in Iowa.[5] It is difficult

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5. § 598.6 requires a one-year residency of a petitioner "(e)xcept where

5. (cont'd)
respondent is a resident of this state and is served by personal service, . . ."

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to conceive how "a couple might determine whether the move itself has helped restore tranquility to their estranged relationship" when in fact they are living in different states. The majority's argument would be more plausible had the state ween fit to impose a one-year deferral period where both the petitioner and the respondent are residents of the state.

The final state interest advanced by the majority is that the one-year deferral period "serves to discourage Iowa from unnecessarily interfering with a marital relationship between non-residents in which it has no interest." This argument, however, ignores the fact that in the case of a bona fide resident, the state does have an interest in the marriage relationship regardless of whether the petitioner has been in Iowa for one year. Additionally, the argument ignores the fact that Iowa imposes no one-year deferral period in the situation where the respondent has recently moved to Iowa and the petitioner still lives in another state. The unnecessary interference in that situation, if any, would appear to be no different than in the present case.

Finally, the majority has ignored the due process/access to the courts concept enunciated in Boddie v. Connecticut, supra. Contrary to the majority's contention that "divorce is wholly a creature of

statute, with the absolute power to prescribe the conditions relative thereto being vested in the state", and recognizing that marriage is a fundamental human relationship involving interests of basic importance in our society, the court in Boddie held that a state may not, consistent with the obligations imposed by the Due Process Clause, deny one class of citizens access to the procedures for adjusting that relationship, absent a showing by the State of a sufficient countervailing justification for that denial. Boddie, supra, at 380; Wymelenberg v. Syman, supra; Whitehead v. Whitehead, supra. As with the filing fee requirement in Boddie, the durational residence requirement of § 598.6 denies one class of citizens access to the only procedure available for obtaining a dissolution. As a result, the state must show a sufficient countervailing justification for its restriction on plaintiff's right to access to the courts to dissolve her marriage, which it totally failed to do.

For the above reasons I am of the view that the state has shown no sufficient countervailing justification to support its one-year residence requirement in light of the alternatives available.

July 11, 1973.

/s/ Edward J. McManus, Chief Judge
UNITED STATES DISTRICT COURT

APPENDIX B

Ruling on special appearance entered in

Iowa District Court in and for Jackson

County, Iowa, on December 27, 1972, at

4:25 p.m.

IN THE DISTRICT COURT OF IOWA
IN AND FOR JACKSON COUNTY

IN RE THE MARRIAGE OF CAROL MAUREEN SOSNA
AND MICHAEL SOSNA

Upon the Petition of CAROL MAUREEN SOSNA, Petitioner, and concerning MICHAEL SOSNA, Respondent.	CASE NO. D-1-150 RULING ON SPECIAL APPEARANCE

Respondent's special appearance attacking the jurisdiction of this court was submitted November 20th, 1972, on oral arguments and written briefs. Counsel for each party appeared.

Such facts as are available at this stage are not in dispute and in effect are stipulated and obtained by the Court from statements of counsel, the petition, the special appearance and an affidavit filed by petitioner.

Petitioner moved into the State of Iowa in August of 1972. In September of 1972, she filed a petition for dissolution of marriage in this court. Though respondent is a resident of New York City, he was personally served with original notice in Iowa and the circumstances of his convenient presence in this area at the time are unknown to the Court. It is noted that respondent is a "Poverty Lawyer for O.E.O." and that petitioner's attorney is affiliated with the Dubuque, Iowa Area Legal Services Agency. Prior to her move to Iowa, petitioner lived in New York City and there appears to be no question but that New York was the place of matrimonial domicile.

Petitioner admits she has been a resident in Iowa less than one year and requests the court to "waive" this requirement of Iowa law on constitutional grounds. Her affidavit discloses that two weeks prior to her move, "separation" negotiations or agreements in New York involving support were terminated and that separation papers agreed upon by the parties became "out of the question".

Respondent's special appearance asserts lack of jurisdiction in this court by virtue of the provisions of I.C.A. § 598.6, which requires one year's residence in this state of a petitioner when the respondent is nonresident. The Court can find no authority for waiver of this requirement and further feels that I.C.A. § 598.9 is here involved and requires dismissal of the cause on the showing made. Also, petitioner has failed to allege that the maintenance of her residence in Iowa has been in good faith and not for the purpose of obtaining a marriage dissoltuion only, which is a mandatory requirement of § 598.6 in addition to the requirement of § 598.5(6).

This Court is aware of the Federal decisions minimizing residency requirements in certain areas such as welfarism and voting qualifications. The cases cited by petitioner have been reviewed insofar as library resources permit. Special attention has been given to Wymelenberg vs. Syman (Wisconsin 1971), 328 F. Supp. 1353. The Wisconsin statute thereby invalidated was one of prohibition only and required one of the parties to be a bona fide resident of the state for at least two years. It is difficult to determine from the opinion, but it does appear that both spouses were in fact residents of Wisconsin for a period of time and, if that was the case, they were both no doubt effectively denied access to any court. The Iowa statute does not deny a recent arrival in the state, or even a nonresident, access to our courts in dissolution of marriage matters, if the respondent is a resident of Iowa with no length of residence on his part required.

The Iowa statute legimately requires a showing of one year's residence on the issue of good faith residency, where respondent is a nonresident, and to negate residency for the obtaining of a divorce only. This is reasonable, and the rule of reason should prevail in this area which historically lies within the jurisdiction of the states. Where respondent is a nonresident, petitioner is not denied access to any court and can pursue her cause in the place of residence of the respondent which, in this case, was the place of the last common domicile and where divorce or separation proceedings or negotiations were apparently in progress at the time of her move.

The Iowa dissolution of marriage enactment is liberal legislation, perhaps among the most liberal in the country. It may be speculated that this factor prompted petitioner's move to this state. There is no residency requirement for spouses newly domiciled here nor for a respondent newly arrived who is a resident. The requirement above referred to properly applies only to the spouse who leaves the matrimonial domicile and her spouse in the former jurisdiction. This is not class discrimination as petitioner urges nor does it infringe her options to travel. Rather, it implements the state's public policy in a field long reserved to the states. Marital stability involves interests of basic importance in our society. Fundamental human relationship is involved representing one of the basic civil rights of man. In these matters the state has a compelling interest of over-riding significance. The touring petitioner is not unduly discriminated against nor is her class

deprived of equal protection or travel rights by a reasonable residential requirement to evidence good faith and negate residency for the obtaining of a divorce only. For a similar, not identical, case, see Korsrud vs. Korsrud, 45 NW2d 848 (Iowa 1963) wherein the disgruntled divorce litigant fled Hawaii, the matrimonial domicile, to Iowa, and fraudulently claimed residence or domicile, and quickly obtained a decree, later vacated by reason of the law here involved.

Finally, it is well established in this state that fine line decisions involving questions of constitutional law, rights and privileges, are best not decided in the forum of the district court and at this level.

This Court therefore elects to follow the clear statutory law of this state contained in the present dissoltuion of marriage statutes herein cited, which were carried over from the prior divorce statutes and the litigated cases decided under these statutes, and which are precedent for this ruling. Pursuant thereto, this Court finds that it lacks jurisdiction to proceed.

The Court therefore finds that respondent's special appearance should be and the same is hereby SUSTAINED and petitioner's petition for dissolution of marriage is DISMISSED at her cost.

All of which is hereby ordered this 27th day of December, 1972.

/s/ A. L. KECK
JUDGE OF THE 7TH JUDICIAL DISTRICT

COPIES TO COUNSEL

APPENDIX C

Copy of Notice of Appeal filed in U.S.

District Court for the Northern District

of Iowa on September 13, 1973.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

CAROL MAUREEN SOSNA, on behalf of herself and all others similarly situated, Plaintiff,	)	73-C-1002-ED
vs.	)	
THE STATE OF IOWA, and A. L. KECK, individually and as Judge of the District Court of the State of Iowa in and for Jackson County, Defendants.	)	NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Carol Maureen Sosna, on behalf of herself and all others similarly situated, the Plaintiff above named, hereby appeals to the Supreme Court of the United States from the final order dismissing the complaint, entered in this action on July 16, 1973. This appeal is taken pursuant to 28 U.S.C. § 1253.

/s/ Paul E. Kempter
/s/ Fred H. McCaw

Attorneys for Carol Maureen Sosna
630 Fischer Building
Dubuque, Iowa 52001

of Counsel:

/s/ James H. Reynolds

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Note: The opinion and judgment of the United States District Court for the Northern District of Iowa filed on July 16, 1973, was printed as

Appendix A of the Jurisdictional Statement.

The memorandum ruling on a special appearance filed on December 27, 1972, by Judge A. L. Keck of the District Court of Iowa in and for Jackson County was printed as Appendix B of the Jurisdictional Statement.

DOCKET ENTRIES

CASE NO. 73-C-1002-ED

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA

TITLE OF CASE	ATTORNEYS
CAROL MAUREEN SOSNA, on behalf of herself, and all others similarly situated, Plaintiff, vs. THE STATE OF IOWA, and A. L. KECK, individually and as Judge of the District Court of the State of Iowa in and for Jackson County, Defendants.	For Plaintiff: H. Edwin Simmers, Paul E. Kempter, 630 Fischer Bldg. Dubuque, Iowa 52001 Tel: (319) 588-4655. For defendants: Richard C. Turner Attorney General of Iowa George W. Murray Special Assistant Attorney General State House Des Moines, Iowa 50319 Tel: (515) 281-4146

DATE		PROCEEDINGS
1973		
1-12	Filed:	Complaint with Application for Convening of a Three-Judge District Court. (Summonses to Marshall for Service 1/13/73)
1-24	Filed:	Summons returned. Served State of Iowa - 1/17/73. Fees $4.24. Summons returned. Served A. L. Keck - 1/15/73. Fees $10.68. Finding and Request entered 1/23/73. Copies sent Plaintiff's counsel and to Defendants. OB 9, p. 12.
1-29	Filed:	Order entered 1/26/73 by Honorable M. C. Matthes, Chief Judge of the Eighth

DATE	PROCEEDINGS
	Circuit designating the following as a Three-Judge Court to determine the action: Honorable Roy L. Stephenson, Circuit Judge; Honorable William C. Hanson, Judge, U.S. District Court for the Southern and Northern District of Iowa; Honorable Edward J. McManus, Chief Judge, U.S. District Court for the Northern District of Iowa. Copies sent counsel. OB 9, p. 13.
1-31 Filed:	Notice of Pre-Trial Conference to be held at Cedar Rapids, Iowa, on 2/15/73 at 1:00 p.m.

DATE	PROCEEDINGS
2-13 Filed:	Answer of Defendants with Certificate of Mailing.
2-16 Filed:	Stipulation of Fact signed by counsel for the parties. Order on Final Pre-Trial Conference held at Cedar Rapids, Iowa, on 2/15/73. Defendant to file interrogatories on Plaintiff regarding factual issue in case by 2/23/73; Plaintiff to answer interrogatories by 3/2/73; Plaintiff's Findings of Fact, Conclusions of Law, and Brief to be filed by 3/2/73; Defendant's Findings of Fact, Conclusions of Law to be filed by 3/16/73; Plaintiff's reply to be filed

DATE		PROCEEDINGS
		by 3/26/73. Copies to counsel. OB 9, p. 16.
2-23	Filed:	Defendant's Interrogatories to Plaintiff with Certificate of Service.
2-28	Filed:	Plaintiff's Answer to Defendants' Interrogatories.
3-6	Filed:	Plaintiff's Requested Findings of Fact and Conclusion of Law Plaintiff's Brief Plaintiff's Affidavit of Mailing.
3/15	Filed:	Order granting Defendant until 4/2/73 to file proposed Findings of Fact and Conclusions of Law and Brief, and granting Plaintiff until 4/12/73 to file reply. Copies sent counsel.

DATE		PROCEEDINGS
4-2	File:	Brief of Defendants with Requested Findings of Fact and Conclusions of Law with Certificate of Service.
4-12	Filed:	Plaintiff's Reply Brief with Certificate of Mailing.
7-16	Filed:	Findings of Fact, Conclusions of Law and Order - complaint dismissed with prejudice at Plaintiff's costs.
7-16	Filed:	Dissenting Opinion.
7-16	Filed:	Judgment on Decision by the Court.
9-11	Filed:	Notice of Appeal to the Supreme Court of the United States - copies to counsel of record.

DATE	PROCEEDINGS
1974	
2-25	22. Order of Supreme Court of U.S. noting probable jurisdiction.

VERIFIED COMPLAINT

Filed in the United States District Court of the Northern District of Iowa, Eastern Division, on January 12, 1974, at 5:05 p.m.

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF IOWA

(EASTERN DIVISION)

CAROL MAUREEN SOSNA, on behalf of herself, and all others similarly situated,	)	CIVIL ACTION
Plaintiff,	)	No. 73-C-1002-ED
vs.	)	
THE STATE OF IOWA, and A. L. KECK, individually and as Judge of the District Court of the State of Iowa in and for Jackson County,	)	January 12, 1973
Defendants.	)	

COMPLAINT

1. This is an action for declaratory and injunctive relief brought pursuant to Section 1983 of Title 42 of the United States Code and Section 2201 of Title 28

of the United States Code, for redress of the deprivation of rights, privileges and immunities secured to the Plaintiff by the First Amendment and due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

2. Original jurisdiction over the action is conferred upon this Court under the provisions of Section 1343 (3) of Title 28 of the United States Code as such provisions relate to actions arising under Section 1983 of Title 42 of the United States Code.

3. The Plaintiff, on behalf of herself and all others similarly situated, seeks to have Section 598.6 and 598.9 of Chapter 598 of the Code of Iowa, as amended, declared invalid as violative of her right to petition for redress of grievances as secured by the First Amendment

to the Constitution of the United States, in violation of her right under the due process and equal protection clauses of the Fourteenth Amendment and in violation of her right to travel freely from one state to another insofar as it imposes a one-year durational residency requirement on individuals seeking to inititate actions for dissolution of marriage or legal separation in the State of Iowa, and an injunction against its further applications.

4. The Plaintiff requests that a three-judge court be convened to consider the merits of this action in accordance with Sections 2281 and 2284 of Title 28 of the United States Code as she is seeking the invalidation of a State Statute of general application and an injunction against its further application.

5. The Plaintiff seeks, pursuant to

Rule 23, Federal Rules of Civil Procedure, to represent those persons similarly situated, who comprise a class of those residents of the State of Iowa who have resided therein for a period of less than one year and who desire to initiate actions for dissolution of marriage or legal separation, and who are barred from doing so by the one-year durational residency requirement embodied in Sections 598.6 and 598.9 of the Code of Iowa.

6. The Plaintiff is a female resident of the State of Iowa who has resided therein for a period of less than one year, and who desires to initiate an action of dissolution of marriage under Chapter 598 of the Code of Iowa. She is a citizen of the United States.

7. The Defendant, State of Iowa, is one of the several states of the United States of America whose General Assembly

passed into law Chapter 598 (and specifically Sections 598.6 and 598.9 thereof).

The Defendant, A. L. Keck, sued in his individual and official capacity, is a Judge of the District Court of the State of Iowa, in and for Jackson County. He is a resident of the State of Iowa and a citizen of the United States.

8. The Plaintiff, Carol Maureen Sosna, was married to Michael Sosna, on September 5, 1964, in the State of Michigan.

9. The Plaintiff was a domiciliary of the State of Michigan at the time of her marriage.

10. During the first six months of 1972, as a result of serious domestic conflicts, there was a breakdown of the marriage relationship between the Plaintiff and her husband such as to make any reconciliation impossible.

11. The Plaintiff was a resident of the State of New York until August of 1972, when she and her three children moved to Green Island, Jackson County, Iowa. The Plaintiff has resided continuously in the State of Iowa since August, 1972, and intends to make this her permanent home.

12. The Plaintiff initiated an action for dissolution of marriage pursuant to Chapter 598 of the Code of Iowa, but has been barred from so doing by the one-year durational residency requirement as the same is set forth in Sections 598.6 and 598.9 of the Code of Iowa, because she has been a resident for a period of less than one year.

13. On the 20th day of September, 1972, the Plaintiff caused her husband, Michael Sosna, to be served with Original Notice of the dissolution of marriage action in the state of Iowa. On October

24, 1972, Special Appearance attacking the jurisdiction of the Court on residency grounds was filed in said cause on behalf of the said Michael Sosna. On December 27th, the Defendant, A. L. Keck, as Judge of the District Court in and for Jackson County rendered a ruling on said Special Appearance dismissing this Plaintiff's action for dissolution of marriage.

14. The one year residency requirement of Sections 598.6 and 598.9 of the Code of Iowa, on their face and as applied to this Plaintiff and the class she seeks to represent, deprives her of the right to petition of grievances in violation of the First Amendment to the Constitution of the United States, in that it unreasonably and arbitrarily denies her access to a Court of Iowa to seek a dissolution of marriage.

15. The one-year residency requirement of Sections 598.6 and 598.9 of the

Code of Iowa, deprives this Plaintiff and the class she represents of due process and equal protection of the laws as secured by the Fourteenth Amendment to the Constitution of the United States, in that they unreasonably and arbitrarily discriminate against the Plaintiff and the class she represents.

16. The one-year durational residency requirement of Sections 598.6 and 598.9 of the Code of Iowa places invalid restrictions on the right to travel freely amongst the several states of the Union.

17. As a result, the Plaintiff has suffered and will continue to suffer irreparable harm for which there is no remedy at law.

WHEREFORE, the Plaintiff respectfully prays the Court to:

1. Assume jurisdiction of this action;

2. Convene a three-judge court pursuant to Title 28, U.S.C. SS 2281 and 2284 to judge the merits of this action;

3. Designate this to be a class action and name the Plaintiff as the representative of the class designated;

4. Enter a final judgment in accordance with Title 28, U.S.C. SS 2201 and 2204, and Rule 57, Federal Rules of Civil Porcedure, declaring the one-year durational residency requirement of Sections 598.6 and 598.9 of the Code of Iowa to be unconstitutional on its face and as applied;

5. Enter a final order permanently restraining and enjoining further enforcement and application of said Statute;

6. Order the District Court of Iowa in and for Jackson County to assume jurisdition, under the judgment and orders of this Court, of the dissolution of marriage

action previously brought in said Court;

7. Grant such order relief as the Court may deem appropriate.

THE PLAINTIFF,

By /s/ H. Edwin Simmers
H. EDWIN SMMERS

/s/ Paul E. Kempter
PAUL E. KEMPTER

VERIFICATION

STATE OF IOWA)
) SS:
COUNTY OF DUBUQUE)

I, Carol Maureen Sosna, being first duly sworn on oath according to law, hereby depose and say, that I have read the foregoing Complaint, and know the contents thereof, and that the statements contained herein are true and correct to the best of my knowledge, information and belief.

/s/ Carol Maureen Sosna
CAROL MAUREEN SOSNA

Subscribed and sworn to this 10th day of January, 1973.

/s/ Paul E. Kempter
Notary Public in and
for the State of Iowa

ANSWER OF DEFENDANTS

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF IOWA

(CENTRAL DIVISION)

CAROL MAUREEN SOSNA, on behalf of herself, and all others similarly situated,	)	ANSWER OF DEFENDANTS
Plaintiff,	)	
vs.	)	No. 73-C-1002-ED
THE STATE OF IOWA, and A. L. KECK, individually and as Judge of the District Court of the State of Iowa in and for Jackson County,	)	
Defendants.	)	

FIRST DEFENSE

The Court has no jurisdiction over the parties or the subject matter, for the following reasons:

(a) The suit is a suit by a citizen of the State of Iowa against the State of

Iowa within the meaning of the Eleventh Amendment to the Constitution of the United States of America.

(b) This Court has no jurisdiction under 42 U.S.C. § 1983 or the Fourteenth Amendment to the Constitution of the United States, as there is no invidious and purposeful discrimination.

(c) The case involves a political question not subject to jurisdiction of the Federal Courts.

(d) The suit involves primarily state laws or constitutions, and this Court should abstain until Iowa Courts have ruled on such issue.

(e) None of the statutes of the State of Iowa nor the United States of America set forth in the Complaint grant Federal jurisdiction.

SECOND DEFENSE

Plaintiff's Complaint fails to state a cause of action.

ANSWER

1. Defendants deny the allegations and conclusions contained in paragraph 1.

2. Defendants deny the allegations and conclusions of paragraph 2.

3. The Defendants deny the allegations and conclusions of paragraph 3.

4. The Defendants do not resist the request for a three-judge court contained in paragraph 4.

5. Defendants admit the allegations of paragraph 5.

6. Defendants admit the allegations of paragraph 6.

7. Defendants admit the allegations of paragraph 7.

8. The Defendants admit the allegations of paragraph 8.

9. The Defendants admit the allegations of paragraph 9.

10. The Defendants deny the allegations and conclusions in paragraph 10.

11. The Defendants deny the allegations of paragraph 11.

12. The Defendants admit the allegations of paragraph 12.

13. Defendants admit the allegations of paragraph 13.

14. The Defendants deny the allegations and conclusions of paragraph 14.

15. Defendants deny the allegations and conclusions of paragraph 15.

16. Defendants deny the allegations and conclusions of paragraph 16.

17. Defendants deny the allegations of paragraph 17.

WHEREFORE, Defendants pray that the Complaint be dismissed at Plaintiff's cost.

RICHARD C. TURNER
Attorney General of Iowa

/s/ George W. Murray
GEORGE W. MURRAY
Special Assistant
Attorney General
State House
Des Moines, Iowa 50319
Tel: (515) 281-5164

ATTORNEYS FOR DEFENDANTS

Copy mailed to:

Paul E. Kempter and H. Edwin Simmers
630 Fischer Building
Dubuque, Iowa 52001

DEFENDANTS' INTERROGATORIES

TO PLAINTIFF

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF IOWA

(EASTERN DIVISION)

CAROL MAUREEN SOSNA, on behalf of herself, and all others similarly situated,	)	
Plaintiff,	)	
vs.	)	No. 73-C-1002-ED
THE STATE OF IOWA, and A. L. KECK, individually and as Judge of the District Court of the State of Iowa in and for Jackson County,	)	
Defendants.	)	

DEFENDANTS' INTERROGATORIES TO PLAINTIFF

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, you are hereby requested to file answers, under oath to the following written interrogatories.

These interrogatories shall be answered as of the date on which they are filed and shall be deemed continuing up to the time of trial, in that supplementary answers shall be supplied if additional or different information becomes known to the Plaintiff.

Paragraph 3 of the ORDER ON FINAL PRETRIAL CONFERENCE states as follows: "The sole factual dispute in this action is whether Plaintiff has maintained a residence in Iowa in good faith and not for the purpose of obtaining a marriage dissolution only." Counsel for Plaintiff have stated that delay in submission of this matter, due to the nature of the question involved, is detrimental to the Plaintiff. To avoid the necessity of oral depositions which would necessitate a further delay, Defendants request the Plaintiff's response to the following interrogatories

be as thorough and complete as possible.

1. Was Michael Sosna a resident of the State of New York for one year or more prior to the date this action for dissolution of marriage was commenced in the State of Iowa?

2. State, if you know, whether or not there are residency requirements in the divorce laws of the State of New York, and if so what is that requirement? Did you own real property in the State of New York, and if so for what length of time did you own said property?

3. If you owned said real property, did you consider it your "home" and live therein?

4. If said property was your "home" did you or your husband file an application for a "homestead", a real property tax exemption or credit for the year of 1972?

5. Were you employed while living in the State of New York?

6. If employed during the year 1972, is it your intention to pay a state income tax to the State of New York in the year 1973? Prior to leaving New York did you sell or otherwise transfer your real property, furniture and household goods?

7. If said property was sold or otherwise transferred by you, did your husband join in said transfer? If property owned by you was sold, briefly state the disposition of the funds on the sale of same, if any?

8. Were you a registered voter and did you vote in your community and in the State of New York?

9. Prior to or at the time of your leaving New York were you and Michael Sosna living together as husband and wife or were you separated by mutual consent?

10. If separated, for what period of time was this separation in effect? Prior to and during said separation, if any, did you or your husband discuss the possibility of a divorce and did you or your husband consult an attorney for that purpose?

11. Did you or your husband have grounds for divorce under the laws of the State of New York?

12. If either party had grounds for divorce in New York, please state same?
In your move from the State of New York to the State of Iowa did you bring with you your furniture, furnishings, and necessary household goods?

13. Upon your arrival in Iowa did you purchase real estate for the purpose of establishing a home for you and your children, and if so, was it necessary that you obtain a mortgage for part of the purchase price?

14. If you did not purchase real property, did you lease premises in which you and your children are now living?

15. If you have leased real property, have you executed a written lease, and if so, what is the length of time of occupancy under the terms of said lease?

16. Are you a member of a church or do you have any other local religious affiliation in the community in which you are now living?

17. Have you established credit or charge accounts with merchants in your surrounding community?

18. If you were employed while living in the State of Iowa, have you paid a state income tax?

19. Prior to coming to the State of Iowa did you have any relations or friends living here who influenced your decision or desire to become a resident of the

State of Iowa, and if so, please identify the same and state their relationship or association with you? Is Michael Sosna still a resident of the State of New York?

20. Have you and Michael Sosna, since your stay in Iowa, ever discussed the possibilities of reconciliation or whether you would return to the State of New York to live as his wife or has he expressed any intention of moving to the State of Iowa to live with you and your children?

21. At the time your action for dissolution of marriage was commenced in Jackson County and Michael Sosna was personally served with notice of said action, was Michael Sosna in the State of Iowa for personal reasons of his own or was he in the State of Iowa at your request?

22. At a time immediately preceeding your commencing your action for dis-

solution of marriage, did you discuss with Michael Sosna, a lawyer, the differences between the grounds for divorce in the State of New York and in the State of Iowa?

23. At a time prior to your commencing your action for dissoution of marriage, either in New York or in Iowa, did you and Michael Sosna enter into any kind of an agreement concerning the state in which your action would be commenced? If so, relate the details of same.

24. Are you presently employed in the State of Iowa?

25. Are you receiving any financial assistance from any person or persons or from any governmental body in the State of Iowa?

26. Have you entered into any long time financial obligations, payable in Iowa, for the purpose of commencing a business, buying a home or for any other

reason personal to you and the support of your children? If so, state the nature of same.

RICHARD C. TURNER
Attorney General of Iowa

/s/ George W. Murray
GEORGE W. MURRAY
Special Assistant
Attorney General
State House
Des Moines, Iowa 50319
Tel: (515) 281-5164

ATTORNEYS FOR DEFENDANTS

PLAINTIFF'S ANSWER

TO INTERROGATORIES

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF IOWA

(EASTERN DIVISION)

CAROL MAUREEN SOSNA, on behalf of herself, and all others similarly situated, Plaintiff, vs. THE STATE OF IOWA, and A. L. KECK, individually and as Judge of the District Court of the State of Iowa in and for Jackson County, Defendants.	CIVIL ACTION No. 73-C-1002-ED PLAINTIFF'S ANSWER TO INTERROGATORIES

Plaintiff states:

1. Yes.

2. I do not know New York divorce law residency requirements. Yes, My husband and I owned a home in New York from September, 1970 to July, 1972.

3. Yes.

4. Yes.

5. Yes.

6. I was not employed in New York in 1972. My husband and I divided our furniture and household goods; I brought my share to Iowa. The real property was sold.

7. Our house was sold in July, 1972; both my husband and I joined in the transfer. The proceeds are in an escrow account which can be divided only upon the dissolution of our marriage.

8. I voted in New York while a resident there and voted in Iowa twice after my move to this state.

9. My husband and I lived together in New York from October, 1967, to August, 1971, and were separated but both living in New York from August, 1971, to August, 1972.

10. My husband and I have been separated since August of 1971 and both of us

discussed a legal separation and consulted our respective attorneys prior to and during said separation.

11. Yes, both my husband and I.

12. I had grounds of mental cruelty and adultery, my husband had grounds of mental cruelty. In my move to Iowa, I brought all my possessions and possessions of my children, including furniture, furnishings and necessary household goods.

13. No.

14. Yes.

15. Yes, 12 months.

16. I was baptized a Catholic but since the age of 12 I have not been a member of any organized religious organization.

17. No, I always pay cash for everything.

18. I have not yet filled out my state income tax form for 1972.

19. Yes, Jay and Ellen Jenson, Clinton, friends encouraged me to move to Iowa when my money in New York ran out. Other friends from Iowa, now living in New York, also encouraged the move. Michael Sosna is still a New York resident.

20. No, we have never discussed reconciliation and he has never expressed any intention of moving to Iowa.

21. He was in Iowa for his own reason to visit our children.

22. No.

23. No.

24. Yes, I do general office work for the Wildflower Photographic Studio in Green Island, Iowa.

25. I receive food stamps and share in the income from the photographic studio.

26. I have helped purchase a state sales tax permit for "Wildflower" which is now only a photographic studio but which

may expand into the natural food area this summer.

CAROL MAUREEN SOSNA,
Plaintiff

By /s/ H. Edwin Simmers
H. EDWIN SIMMERS
630 Fischer Building
Dubuque, Iowa 52001
Tel: (319) 588-4655

ATTORNEY FOR PLAINTIFF

STATE OF IOWA)
) SS:
COUNTY OF DUBUQUE)

I, Carol Maureen Sosna, being personally sworn, depose and state that I have read the foregoing Plaintiff's Answer To Interrogatories, know the contents thereof and that the statements contained therein are true and correct as I verily believe.

/s/ Carol Maureen Sosna
CAROL MAUREEN SOSNA

Subscribed and sworn to before me this 26th day of February, 1973.

/s/ Alan L. Pearson
Notary Public in and
for the State of Iowa

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF IOWA

(EASTERN DIVISION)

CAROL MAUREEN SOSNA, on behalf of herself, and all others similarly situated,	)	73-C-1002-ED
Plaintiff,	)	
vs.	)	
THE STATE OF IOWA, and A. L. KECK, individually and as Judge of the District Court of the State of Iowa in and for Jackson County,	)	STIPULATION OF FACT
Defendants.	)	

A. Stipulation of Fact:

1. Plaintiff Carol Maureen Sosna is presently a resident of Green Island in Jackson County, Iowa. She has physically resided there since August, 1972. Prior to that time plaintiff resided in the State of New York for a period of more

than one year.

2. Plaintiff was married to Michael Sosna on September 5, 1964, in the State of Michigan. Said marriage is believed to be valid and in effect at the present time.

3. At all times material to this action Michael Sosna was a resident of a state other than Iowa.

4. Plaintiff desires to have her marriage to Michael Sosna dissolved under Chapter 598 of the 1971 Code of Iowa.

5. Plaintiff has attempted to initiate proceedings under Chapter 598, 1971 Code of Iowa to have her marriage to Michael Sosna dissolved but her petition was dismissed by Judge A. L. Keck solely on the basis of the one year residency requirement.

6. There exists in the State of Iowa numerous people in the same situation as

plaintiff, that is of being barred by the one year residency requirement from having their marriages dissolved. These numbers are so numerous as to make joinder impracticable. Plaintiff's claims are representative of the class and she will fairly and adequately protect the interests of the class.

7. All evidence in the case may be heard by the Honorable Edward J. McManus one of the Three-Judge Court, and the case may be decided by the Three-Judge Court on the transcript of the evidence together with such oral arguments as the court deems necessary after reviewing the briefs.

February 15, 1973.

/s/ George W. Murray
Attorney for Defendants

/s/ H. Edwin Simmers
Attorney for the Plaintiff

Supreme Court, U. S.
FILED
JAN 25 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-762

CAROL MAUREEN SOSNA,

Appellant,

v.

THE STATE OF IOWA,

Appellee.

APPELLEE'S MOTION TO DISMISS

JAMES H. REYNOLDS
Attorney at Law
PAUL E. KEMPTER
Attorney at Law
FRED H. McCAW
Attorney at Law
630 Fischer Bldg.
Dubuque, Ia. 52001
Attorneys for Appellant

RICHARD C. TURNER
Attorney General of Iowa
GEORGE W. MURRAY
Special Assistant Attorney General
ELIZABETH A. NOLAN
Assistant Attorney General
State Capitol
Des Moines, Ia. 50319
Attorneys for Appellee

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-762

CAROL MAUREEN SOSNA,

Appellant,

v.

THE STATE OF IOWA,

Appellee.

APPELLEE'S MOTION TO DISMISS

OPINION BELOW

The opinion and order of the three-judge court of the northern district of Iowa is marked as Appendix A of Appellant's Jurisdictional Statement and as 42 U.S.L.W. 2086 and 380 F.Supp. 1182. This decision dismissed the appellant's case in the trial court.

JURISDICTION

The appellant alleges jurisdiction of this appeal by this court under the provisions of 28 U.S.C. §1253.

QUESTIONS PRESENTED

The appellant presents two questions to this Court which are stated as follows:

A. Do Sections 598.6 and 598.9 of the Code of Iowa present an unconstitutional infringement upon the appellant's Fourteenth Amendment right to equal protection of the laws by creating a discriminatory classification which has the effect of penalizing her fundamental right of free interstate migration and which is not justified by a compelling state interest?

B. Do Sections 598.6 and 598.9 of the Code of Iowa present an unconstitutional infringement upon the rights guaranteed to the Appellant by the First Amendment and the Due Process Clause of the Fourteenth Amendment by denying access to the courts through an irrebuttable presumption of law which is overbroad in its reach and which is not justified by a state interest of overriding significance?

STATUTES

The following statutes from the Code of Iowa and the United States Constitution are alleged relevant to this case:

Section 1 of the 14th Amendment to the Constitution of the United States;

Section 598.6, Code of Iowa, 1971;

Section 598.9, Code of Iowa, 1971;

Section 598.16, Code of Iowa, 1971;

Section 598.19, Code of Iowa, 1971.

Section 1 of the 14th Amendment to the U.S. Constitution and the above designated Iowa statutes are reproduced and will be found as Appendix A to this motion.

STATEMENT OF THE CASE

For the purposes of this appeal, the appellee agrees with the statement of the case found in the appellant's Jurisdictional Statement at pages four (4) and five (5).

ARGUMENT

Two judges of the three-judge court convened to hear this case in the trial below directly found that divorce or dissolution of marriage is not a constitutional right, nor is it a basic necessity to survival, and cannot be considered a "fundamental right" and hence, refused to apply the "strict scrutiny" test, when considering the one-year residence requirement in actions commenced by recent arrivals in the State. *Pennoyer v. Kness*, 95 U.S. 714, 734-35, S.Ct. (1877). In the opinion of the judges, and traditionally so, divorce or dissolution is wholly a creature of statute, with the absolute power to prescribe the conditions relative thereto be invested in the State.

The opinion also noted as significant, the fact that in 1970 the State of Iowa had adopted a dissolution of marriage act which was based upon a "no fault concept of divorce". Referring to 20 Drake Law Review 211 (1971). The opinion stated:

"While this innovative reform promotes a more harmonious dissolution of a marrital breakdown, . . . , it was not the intent of the legislature to create in Iowa a virtual sanctuary transcend divorces based upon sham domiciles. To the contrary, Iowa

law favors preservation of marriage whenever possible, as evidenced by the 90-day conciliation period of the new Iowa act."

The court went on to find that Iowa's interest in establishing a 1-year deferral period is sufficiently compelling to render the durational residency requirement constitutionally permissible.

On page six (6) of its Jurisdictional Statement, appellant has stated three cases that have found divorce residency requirements unconstitutional. The *Wymelenberg*, the *Larson* and the *Mon Chi Heung Au*, at the citations indicated therein. In both the *Wymelenberg* and *Larson* cases, the respective courts relied heavily upon *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322 (1969) (a case overturning a one-year residency requirement before new arrivals could be eligible for welfare benefits–a necessity of life) and *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995 (1972), (a case concerned with residency requirements for purposes of voting). The holding in the *Mon Chi Heung Au* case decided by the Federal District Court in Hawaii in 1969, holding divorce residency requirements unconstitutional, was not cited in the more recent case by the Hawaii Supreme Court in *Whitehead v. Whitehead*, 492 P.2d 939 (1972) where that court held the residency requirements of the divorce law constitutional and thoroughly distinguished the *Shapiro* and *Dunn* cases.

In addition to the *Whitehead* case, other state courts and a recent federal district court case from Florida have upheld the divorce residency requirement statutes; *Place v. Place*, 278 A.2d 710 (Vermont, 1971); *Coleman v. Coleman*, 291 N.E.2d 530 (Ohio, 1972); *Shiffman and Makres, Plaintiffs, v. Askew* (M.D. Florida, Tampa Division, June 1, 1973), 359 F.Supp. 1225 (1973). In

this latter case, District Court Judge Hodges extensively reviewed the cases on this question and the philosophy behind the residency requirement in divorce or dissolution of marriage proceedings (Florida has also adopted a "no fault" dissolution of marriage law).

The *Shapiro* and *Dunn* cases clearly point out that being denied the right to welfare benefits immediately effects a basic need and not being able to exercise a constitutional right to vote in an election denies a right that is lost forever, hence, the authority of these cases, based upon the factual situations presented in them, cannot be doubted. However, it cannot be successfully contended that the same result must be reached when considering divorce or dissolution of marriage residency requirements.

CONCLUSION

For the above and foregoing reasons, this appeal should be dismissed and the order entered by the three-judge district at the trial of the case should be affirmed.

Respectfully submitted,

RICHARD C. TURNER
Attorney General of Iowa

GEORGE W. MURRAY
Special Assistant Attorney General

ELIZABETH A. NOLAN
Assistant Attorney General

Attorneys for Appellee

APPENDIX A

Constitution of the United States, Amendment 14, §1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Code of Iowa, 1971; Section 598.6

"Except where the respondent is a resident of this state and is served by personal service, the petition for dissolution of marriage, in addition to setting forth the information required by section 598.5, must state that the petitioner has been for the last year a resident of the state, specifying the county in which the petitioner has resided, and the length of such residence therein after deducting all absences from the state; and that the maintenance of the residence has been in good faith and not for the purpose of obtaining a marriage dissolution only."

Code of Iowa, 1971; Section 598.9

"If the averments as to residence are not fully proved, the hearing shall proceed no further, and the action be dismissed by the court."

Code of Iowa, 1971; Section 598.16

"A majority of the judges in any judicial district, with the co-operation of any county board of social welfare in

such district, may establish a domestic relations division of the district court of the county where such board is located. Said division shall offer counseling and related services to persons before such court.

"The court shall require such parties to undergo conciliation for a period of at least ninety days from the issuance of an order setting forth the conciliation procedure and the conciliator. Such conciliation procedures may include, but shall not be limited to, referrals to the domestic relations division of the court, if established, public or private marriage counselors, family service agencies, community mental health centers, physicians and clergymen. Conciliation may be waived by the court upon a showing of good cause; provided, however, that it shall not be waived if either party or the attorney appointed pursuant to section 598.12 objects."

Code of Iowa, 1971; Section 598.19.

"No decree dissolving a marriage shall be granted in any proceeding before ninety days shall have elapsed from the day the original notice is served, or from the last day of publication of notice, or from the date that waiver or acceptance of original notice is filed or until after conciliation is completed, whichever period shall be longer. However, the court may in its discretion, on written motion supported by affidavit setting forth grounds of emergency or necessity and facts which satisfy the court that immediate action is warranted or required to protect the substantive rights or interests of any party or person who might be affected by the decree, hold a hearing and grant a decree dissolving the marriage prior to the expiration of the applicable period, provided that requirements of notice have been complied with. In such case the grounds of emergency or necessity and the facts with respect thereto shall be recited in the decree unless otherwise ordered by this court."

Supreme Court, U. S.
FILED
MAY 4 1974
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

CAROL MAUREEN SOSNA, on behalf of herself and all others similarly situated,	)	
Appellant,	)	October Term, 1973
vs.	)	No. 73-762
THE STATE OF IOWA, and A. L. KECK, individually, and as Judge of the District Court of the State of Iowa in and for Jackson County,	)	

BRIEF OF APPELLANT

PAUL E. KEMPTER
JAMES H. REYNOLDS
FRED H. McCAW

630 Fischer Building
Dubuque, Iowa 52001

Attorneys for Appellant

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IN THE SUPREME COURT OF THE

UNITED STATES

No. 73-762

CAROL MAUREEN SOSNA, on behalf of herself and all others similarly situated,

Appellant,

vs.

THE STATE OF IOWA, and A. L. KECK, individually, and as Judge of the District Court of the State of Iowa in and for Jackson County.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA

BRIEF OF APPELLANT

REPORTS

The memorandum opinion and order entered on July 16, 1973, by the three-judge court convened in the Northern District of Iowa is attached as Appendix A to the Jurisdictional Statement. The opinion was reported at 42 U.S.L.W. 2086 and 360 F. Supp. 1182.

The memorandum ruling on a special appearance entered on December 27, 1972, by Judge A. L. Keck of the District Court of Iowa in and for Jackson County is attached as Appendix B to the Jurisdictional Statement.

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction of this appeal under 28 U.S.C. Section 1253, which allows a direct appeal to the Supreme Court from a final order of a three-judge court denying a permanent injunction

in a civil action required to be heard by a three-judge court. Appellant herein sought to have enjoined the enforcement of a state statute on the ground that it is unconstitutional. The action was based upon the authority of 42 U.S.C. Section 1983 and 28 U.S.C. Section 1343 (3).

Under 28 U.S.C. Section 2281, such an action must be heard by a three-judge court. On Appellant's application, Chief Judge Matthes ordered the convening of a three-judge court in his order of January 23, 1973. In its order of July 16, 1973, the court denied the relief sought on the ground that the state statutes under challenge do not violate the United States Constitution.

Notice of Appeal to the Supreme Court was filed in the United States District Court for the Northern District of Iowa on September 13, 1973, within the sixty

days allowed by 28 U.S.C. Section 2101 (b).

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves the following constitutional provisions and statues:

CONSTITUTION OF THE UNITED STATES, Amendment 1:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

CONSTITUTION OF THE UNITED STATES, Amendment 14, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CODE OF IOWA, 1973, Section 598.6 (Vol. II, P. 2906):

Additional contents. Except where the respondent is a resident of this state and is served by personal service, the petition for dissolution of marriage, in addition to setting forth the information required by Section 598.5, must state that the petitioner has been for the last year a resident of the state, specifying the county in which the petitioner has resided, and the length of such residence therein after deducting all absences from the state; and that the maintenance of the residence has been in good faith and not for the pur-

pose of obtaining a marriage dissolution only.

CODE OF IOWA, 1973 Section 598.9 (Vol. II, P. 2907):

Residence - failure of proof. If the averments as to residence are not fully proved, the hearing shall proceed no further, and the action be dismissed by the Court.

CODE OF IOWA, 1973, Section 598.11 (Vol. II, P. 2907):

Temporary orders. The court may order either party to pay the clerk a sum of money for the separate support and maintenance of the other party and the children and to enable such party to prosecute or defend the action.

The court may make such an order when a claim for temporary support is made by the petitioner in the petition, or upon

application of either party, after service of the original notice and when no application is made in the petition; however, no such order shall be entered until at least five days' notice of hearing, and opportunity to be heard, is given the other party. Appearance by an attorney or the respondent for such hearing shall be deemed a special appearance for the purpose of such hearing only and not a general appearance.

CODE OF IOWA, 1973, Section 598.12 (Vol. 11, P. 2907):

Attorney for minor child. The court may appoint an attorney to represent the interests of the minor child or children of the parties. Such attorney shall be empowered to make independend investigations and to cause witnesses to appear and testify before the court on matters pertinent to the interests of the child-

ren. The court shall enter an order in favor of such attorney for fees and disbursements, which amount shall be charged against the party responsible for court costs unless the court determines that the party responsible for costs is indigent in which event the fees shall be borne by the county.

CODE OF IOWA, 1973, Section 598.16 (Vol. 11, P. 2907 and 2908):

Conciliation. A majority of the judges in any judicial district, with the co-operation of any county board of social welfare in such district, may establish a domestic relations division of the district court of the county where such board is located. Said division shall offer counseling and related services to persons before such court.

The court shall require such parties to undergo conciliation for a period of at

least ninety days from the issuance of an order setting forth the conciliation procedure and the conciliator. Such conciliation procedures may include, but shall not be limited to, referrals to the domestic relations division of the court, if established, public or private marriage counselors, family service agencies, community mental health centers, physicians and clergymen. Conciliation may be waived by the court upon a showing of good cause; provided, however, that it shall not be waived if either party or the attorney appointed pursuant to Section 298.12 objects.

The costs of any such conciliation procedures shall be paid by the parties; however, if the court determines that such parties will be unable to pay the costs without prejudicing their financial ability to provide themselves and any minor child-

ren with economic necessities, such costs may be paid from the court expense fund.

CODE OF IOWA, 1973, Section 598.19 (Vol. II, P. 2908):

Waiting period before decree. No decree dissolving a marriage shall be granted in any proceeding before ninety days shall have elapsed from the day the original notice is served, or from the last day of publication of notice, or from the date that waiver or acceptance of original notice is filed or until after conciliation is completed, whichever period shall be longer. However, the court may in its discretion, on written motion supported by affidavit setting forth grounds of emergency or necessity and facts which satisfy the court that immediate action is warranted or required to protect the substantive rights or interests of any party or person who might be

affected by the decree, hold a hearing and grant a decree dissolving the marriage prior to the expiration of the applicable period, provided that requirements of notice have been complied with. In such case the grounds of emergency or necessity and the facts with respect thereto shall be recited in the decree unless otherwise ordered by the court.

CODE OF IOWA, 1973, Section 598. 27 (Vol. II, P. 2909):

Remarriage. In every case in which a marriage dissolution is decreed, neither party shall marry again within a year from the date of the filing of said decree unless permission to do so is granted by the court. Nothing herein contained shall prevent the persons whose marriage has been dissolved from remarrying each other. Any person marrying contrary to the provisions of this section shall de deemed guilty of

a misdemeanor and upon conviction shall be punished accordingly.

CODE OF IOWA, 1973, Section 598.28 (Vol. II, P. 2909):

Separate maintenance and annulment. A petition shall be filed in separate maintenance and annulment actions as in actions for dissolution of marriage, and all applicable provisions of this chapter in relation thereto shall apply to separate maintenance and annulment actions.

28 U.S.C. Section 1253:

Direct appeals from decisions of three-judge courts. Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be

heard and determined by a district court of three judges.

28 U.S.C. Section 1343:

Civil rights and elective franchise. The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

****

3. To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

28 U.S.C. Section 2281:

Injunction against enforcement of State statute - Three-judge court required. An interlocutory or permanent injunction

restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefore is heard and determined by a district court of three judges under Section 2284 of this title.

42 U.S.C. Section 1983:

Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other per-

son within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

QUESTIONS PRESENTED FOR REVIEW

1. Do Sections 598.6 and 598.9 of the Code of Iowa present an unconstitutional infringement upon the Appellant's Fourteenth Amendment right to equal protection of the laws by creating a discriminatory classification which has the effect of penalizing her fundamental right of free interstate migration and which is not justified by a compelling state interest?

2. Do Sections 598.6 and 598.9 of the Code of Iowa present an unconstitutional infringement upon the rights guaranteed to the Appellant by the First Amendment and the Due Process Clause of the Fourteenth Amendment by denying access to the courts through an irrebuttable presumption of law which is overbroad in its reach and which is not jusitifed by a state interest of overriding significance?

3. Should the United States District Court have proceeded to the merits of the constitutional issue presented in light of Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27L. Ed. 2d 669 (1971) and related cases?

STATEMENT OF THE CASE

The Appellant, Carol Maureen Sosna, is presently a resident of Green Island, Jackson County, Iowa. She has resided there since August, 1972, prior to which she resided in the State of New York. She was married to Michael Sosna on September 5, 1964, in the State of Michigan.

In September, 1972, Appellant instituted marriage dissolution proceedings against Michael Sosna, a resident of New York, in the District Court of Iowa, Jackson County, pursuant to Chapter 598 of the Code of Iowa. Personal service was obtained upon Michael Sosna while he was temporarily present in Iowa.

Section 598.6 of the Code of Iowa requires a one-year Iowa residency by a petitioner whose spouse is a non-resident. By order dated December 27, 1972, District Judge A. L. Keck, a co-appellee herein, in a ruling on a special appearance of the respondent, dismissed the petition pursuant to Section 598.9 of the Code of Iowa for want of jurisdiction.

Appellant brought a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure seeking to have Sections 598.6 and 598.9 declared unconstitutional as violative of her rights under the First and Fourteenth Amendments to the U.S. Constitution. Appellant also asked for a permanent injunction against further enforcement of Sections 598.6 and 598.9.

A three-judge district court was convened to consider the merits of the cause pursuant to 28 U.S.C. Section 2281. By order dated July 16, 1973, and signed by Circuit Judge Roy L. Stephenson and Chief District Judge William C. Hanson, with Chief District Judge Edward J. McManus

dissenting, Appellant's complaint was dismissed. Thereafter, on September 13, 1973, Appellant filed Notice of Appeal to the Supreme Court.

SUMMARY OF ARGUMENT

I

The Iowa dissolution of marriage residency requirement creates a discriminatory classification which has the effect of penalizing certain newcomers for having recently exercised their fundamental right of free interstate migration. To withstand review under the Fourteenth Amendment Equal Protection Clause the state must show a compelling justification for the classification. Examination of state interests which have been asserted and which are self-evident discloses no legitimate state interest which approaches compelling status and which could not be adequately protected by a more narrowly drawn statute. Requiring petitioners to plead and prove bona fide domicile would serve any interest the state may have in limiting

access to its courts to residents and would not affect the rights of persons who are actual residents but who have lived in the state less than one year.

II

Since it monopolizes the means by which the fundamental marriage relationship can be adjusted, the state is obliged under the Due Process Clause of the Fourteenth Amendment to provide equal access to the dissolution procedures to all its citizens or to justify any denial of such access by a state interest of overriding significance. No such justification can be shown in light of the available alternative of requiring only the pleading and proving of bona fide domicile. In addition, the residency requirement creates a conclusive presumption of nonresidency which is often not true in fact but which there is no opportunity to rebut. The denial of access to the courts and of an opportunity to controvert the presumption of nonresidency result in a violation of Due Process guarantees.

III

The Younger v. Harris decisions do not imply that the District Court below should have denied relief without consideration of the merits. Later cases have made it clear that the considerations of equity, comity, and federalism do not have the same force where there will be no interference with an ongoing State proceeding. The concern for intervening in criminal prosecutions does not apply to the same effect when a federal court is asked to give equitable relief from an unconstitutional state civil statute. It is not necessary to exhaust state judicial remedies, and the Appellant's choice of a

federal forum must be respected. Actions for relief under 42 U.S.C. Section 1983 involve unique considerations of the proper federal role. An unrestricted judiciary is essential for the continuing protection of individual liberties.

ARGUMENT

DIVISION I

THE REQUIREMENTS OF IOWA CODE SECTIONS 598.6 AND 598.9, THAT A PETITIONER FOR DISSOLUTION OF MARRIAGE WHOSE SPOUSE IS NOT A RESIDENT OF IOWA MUST RESIDE IN IOWA FOR A PERIOD OF ONE YEAR PRIOR TO THE FILING OF THE PETITION, CONSTITUTES A VIOLATION OF THE PETITIONER'S RIGHTS UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A.

THE ONE-YEAR RESIDENCE REQUIREMENT CREATES A DISCRIMINATORY CLASSIFICATION WHICH CAN BE JUSTIFIED ONLY BY A SHOWING THAT IT PROMOTES A COMPELLING STATE INTEREST AND THAT ITS REACH IS NOT UNNECESSARILY OVERBROAD.

Any durational residency requirement automatically creates two classes of persons, indistinguishable but for the length

of their stay within a geographical area. The Iowa dissolution of marriage residency requirement discriminates between persons who have lived in Iowa for a year or more or whose spouses also live in Iowa and persons who have lived in Iowa for less than a year. Persons within the former class may seek to settle their marital grievances in the state courts through dissolution, separate maintenance, or annulment. The latter class may not. Iowa Code ections 598.6, 598.9, and 598.28.

Under the Equal Protection Clause of the Fourteenth Amendment, state laws which create discriminatory classifications must be justified by a countervailing state interest. Generally, a rational connection between the state interest and the classification has been found to satisfy the requirements of the Fourteenth Amendment.

Fleming v. Nestor, 363 U.S. 603 (1960); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949).

However, where a state law not only creates discriminatory classifications, but affects the exercise of a fundamental constitutional right, the state must show not only a rational connection, but that the classification is necessary to promote a compelling state interest. Sherbert v. Verner, 374 U.S. 398 (1963); Gibson v. Florida Investigation Comm., 372 U.S. 589 (1963).

Recent Supreme Court decisions have clearly recognized that durational residency requirements affect the exercise of such a fundamental right - the right of free interstate migration, the right to travel:

> "(I)n moving from State to State or to the District of Columbia appel-

lees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to promote a compelling governmental interest, is unconstitutional." Shapiro v. Thompson, 394 U.S. 618, 634, 89 S. Ct. 1322, 1331 (1969).

In Shapiro, the Court found that the justifications for imposing a one year residence requirement on welfare recipients, while rational, were not compelling; and the discrimination was therefore held unconstitutional. 394 U.S. 627, 633, 634, 637, 638.

Similarly, in Dunn v. Blumstein, 405 U.S. 330, 339, 92 S. Ct. 995, 1001 (1972), holding invalid a residency requirement for voting, the Court said, "Preceded by a long line of cases recognizing the constitutional right to travel, and repeated-

ly reaffirmed in the face of attempts to disregard it, ..., Shapiro and the compelling-state-interest test it articulates control this case."

Again holding Shapiro to control the standard of review, the Court said in Memorial Hospital v. Maricopa County, 94 S. Ct. 1076, 1080 (1974). "We agree with appellants that Arizona's durational residency requirement for free medical care must be justified by a compelling state interest..."

The status of the right to travel freely from state to state as fundamental constitutional right is beyond argument. Shapiro v. Thompson, 394 U.S. 618, 630, 630 n.8, 89 S. Ct. 1322, 1329, 1329 n.8; Memorial Hospital v. Maricopa County, 94 S. Ct. 1076, 1080, 1080 n.7; Dunn v. Blumstein, 405 U.S. 330, 338, 92 S. Ct. 995, 1001.

The compelling state interest test is "triggered" by any classification which exacts a "penalty" on the exercise of the right to travel. Dunn v. Blumstein, 405 U.S. 330, 340, 92 S. Ct. 995, 1002. A one-year wait required only of persons who have recently exercised their right to travel and who wish to petition for a dissolution of marriage is such a penalty.

It could be argued that the compelling interest test should not be triggered where the benefit denied to newcomers by the residency requirement is not a "basic necessity of life". Such an argument might claim to find support in some language of Maricopa County, 94 S. Ct. 1076, 1082, 1083, 1084. That language is used in connection with the issue of how severe a "penalty" is required to raise the compelling interest test. It has been argued by Appellee and by the majority below, 360

F. Supp. 1182, 1184, that the right to a divorce does not enjoy fundamental status and that the consequent penalty upon the free exercise of the right to travel is thus not in a class with the penalties of Shapiro, Dunn, and Maricopa County.

The Supreme Court recently had occasion to discuss the status of marriage and divorce. Discussing Boddie v. Connecticut, 401 U.S. 371, 91 S. Ct. 780 (1971), the Court said:

> "The denial of access to the judicial forum in Boddie touched directly, as has been noted, on the marital relationship and on the associational interests that surround the establishment and dissolution of that relationship. On many occasions we have recognized the fundamental importance of these interests under our Constitution. See, for example,

Loving v. Virginia, 388 U.S. 1, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967); Skinner v. Oklahoma, 316 U.S. 535, 86 L. Ed. 1655, 62 S. Ct. 1110 (1942); Griswold v. Connecticut, 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965); Eisenstadt v. Baird 405 U.S. 438, 31 L. Ed. 2d 349, 92 S. Ct. 1029 (1972); Meyer v. Nebraska, 262 U.S. 390, 67 L. Ed. 1042, 43 S. Ct. 625 (1973). The Boddie appellants' inability to dissolve their marriages seriously impaired their freedom to pursue other protected associational activities." U.S. v. Kras, 409 U.S. 434, 444, 34 L. Ed. 2d 626, 635, 93 S. Ct. 631, 640 (1973).

Withholding the right to seek adjustment of the most fundamental of human relationships by the only means available is to impose a penalty of unquestionable

harshness. For persons without the resources to travel to the state where the spouse resides or for persons who are unable to locate their spouses, the marital state is simply frozen for as long as the required period runs. The aggrieved spouse is prohibited by law from attempting to re-establish a normal two-parent family; and irreparable financial and emotional damage may be done to the spouse and the children. With the statutory ninety-day waiting period and the year prohibition on remarriage Iowa Code Sections 598.19, 598.27, the family may be unable to regain normalcy for two years and three months.

An argument that the penalty is inadequate ignores the language of Dunn, 405 U.S. 341, 92 S. Ct. 1003:

> "The right to travel is 'an unconditional personal right', a right whose exercise may not be condi-

tioned... Durational residence laws impermissably condition and penalize the right to travel by imposing their prohibitions on only those persons who have recently exercised that right... Absent a compelling state interest a State may not burden the right to travel in this way."

Elsewhere, the "penalty" in the residency requirement context has been described as the suffering of "disadvantage, loss or hardship due to some action". Cole v. Housing Authority of City of Newport, 435 F. 2d 807, 810 (1st Cir. 1970). When a person is prohibited from obtaining a final resolution of the most fundamental conflict in her life for the lone reason that she has recently exercised her "unconditional personal right" to travel, her use of that right has been "conditioned" and "penalized".

Because she has elected to exercise her constitutionally protected right to travel, the Appellant is now denied the opportunity to seek a dissolution of her marriage, a right which all are free to exercise except certain newcomers. It could be argued that she is not denied this right because she could go back to New York and bring her action in the courts of that state. But the Appellant is of limited economic means, and to force her to undergo the expense and inconvenience of a return to New York would be to require of the Appellant a great personal and financial sacrifice. The sacrifice is made necessary solely by the fact that the Appellant has lived in Iowa less than a year. Thus, her exercise of her right to travel from New York to Iowa has been penalized by the Iowa durational residency requirement. The Appellant has been forced

to choose between the exercise of her right to travel and the exercise of her right to seek a settlement of her marital grievances. Because she has chosen the former she is denied the latter.

A further element of Equal Protection scrutiny is to ascertain whether a state classification, compellingly justified or not, sweeps overbroadly, abridging constitutionally protected rights of persons whose inclusion in the class is unnecessary to serve the legitimate interests of the state. Keyishian v. Bd. of Regents, 385 U.S. 589 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965). In Dunn, 405 U.S. 343, 92 S. Ct. 1003, the Court said:

> "It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the

> State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision', NAACP v. Button, 371 U.S. 415, 438, 83 S. Ct. 328, 340, 9 L. Ed. 2d 405 (1963); United States v. Robel, 389 U.S. 258, 265, 88 S. Ct. 419, 424, 19 L. Ed. 2d 508 (1967), and must be 'tailored' to serve their legitimate objectives. Shapiro v. Thompson, supra, 394 U.S. at 631, 89 S. Ct. at 1329. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means'. Shelton v. Tucker, 364 U.S.

479, 488, 81 S. Ct. 247, 252, 5 L. Ed. 2d 231 (1960).

In summary, the Iowa dissolution of marriage residency requirement must be found to violate the Fourteenth Amendment guarantee of equal protection of the laws unless the penalty which it exacts for the exercise of the fundamental right of interstate migration is shown to be justified by a compelling state interest and unless it is shown to be precisely drawn and not overbroad in its reach.

> "Not unlike the admonition of the Bible that, 'Ye shall have one manner of law, as well for the stranger as for one of your country,' Leviticus 24:22, the right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate

> as are enjoyed by other residents." Memorial Hospital v. Maricopa County, _____ U.S. _____, 94 S. Ct. 1076, 1084.

B.

THE PENALTY ON THE RIGHT TO TRAVEL WHICH RESULTS FROM THE IOWA DISSOLUTION RESIDENCY REQUIREMENT IS NOT JUSTIFIED BY ANY COMPELLING STATE INTEREST EXCEPT, POSSIBLY, THE INTEREST IN LIMITING THE JURISDICTION OF STATE COURTS; AND THAT INTEREST CAN BE ADEQUATELY PROTECTED BY A MORE NARROWLY DRAWN STATUTE.

Once the exercise of a protected freedom has been shown to be penalized and the compelling-state-interest test has been "triggered", the state's compelling interest must be either affirmatively shown or self-evident; or the statute in question should fail Equal Protection scrutiny. Richards v. Thurston, 424 F. 2d 1281, 1286

(1970). Examined herein are state interests which are apparent and those which have been asserted by the Appellee and by other states in similar cases.

1. One possible state interest in a durational residency requirement is to deter persons with marital problems from entering the state. The Court in Shapiro v. Thompson held that "the purpose of inhabiting migration by needy persons into the state is constitutionally impermissible", 394 U.S. at 629, 89 S. Ct. at 1329. The Court also found a similar purpose to be invalid in Memorial Hospital v. Maricopa County, 94 S. Ct. at 1085. Both Shapiro and Maricopa County involved migrants who sought to draw upon local finances and services. It is even harder to justify the exclusion of persons who seek only access to the courts. See also Wymelenberg v. Syman, 328 F. Supp. 1353, 1355 (E.D. Wisc. 1971).

2. States have asserted an interest in encouraging reconciliation of persons with marital problems and in the maintenance of marital stability. It is claimed that the residency requirement serves as a waiting period encouraging a "cooling-off" of emotions and attempts at reconciliation. However, the waiting period is required only of certain newcomers and not of all persons seeking a dissolution. Iowa Code Section 598.6 (1973). Clearly, the distinction cannot be rationally supported. And, even though an interest may be valid, "a state cannot accomplish such a purpose by invidious distinctions between classes of its citizens". Shapiro v. Thompson, 394 U.S. 618, 633. Also see Wymelenberg v. Syman, 328 F. Supp. 1353, 1355.

In addition, the Iowa dissolution chapter provides for a ninety-day cooling-off period to be required of all persons

seeking a dissolution. Iowa Code Section 598.19 (1973). Any legitimate state interest in encouraging reconciliation in all troubled marriages is adequately served by this provision and by the conciliation procedures of Iowa Sections 598.16 and 598.19 (1973).

3. A third possible interest is the administrative convenience afforded by a durational residency requirement in providing evidence of domicile. It is well settled that administrative convenience is not adequate justification for the infringement of constitutional rights. Dunn v. Blumstein, 405 U.S. 330, 351, 92 S. Ct. 995, 1007; Shapiro v. Thompson, 394 U.S. 618, 636, 89 S. Ct. 1332; Schneider v. Rusk, 377 U.S. 163, 167, 84 S. Ct. 1187, 1189 (1964).

"States may not casually deprive a class of individuals of the vote because

of some remote administrative benefit to the State." Carrington v. Rash, 380 U.S. 89, 96, 85 S. Ct. 775, 780 (1964).

> "The State's legitimate purpose is to determine whether certain persons in the community are bona fide residents. A durational residence requirement creates a classification that may, in a crude way, exclude nonresidents from that group. But it also excludes many residents. Given the State's legitimate purpose and the individual interests that are affected, the classification is all too imprecise." Dunn v. Blumstein, 405 U.S. 330, 351, 92 S. Ct. 995, 1007.

4. The reputation of the state may be asserted as a fourth possible interest. It may be claimed that removing the residence requirement would attract forum-shopping migrant litigants, would earn

for the state a reputation as a "quickie divorce mill", or what the majority below called "a virtual sanctuary for transient divorces based on sham domiciles", 360 F. Supp. at 1184, and would make the state a party to surreptitiously obtained divorces. However, by requiring each petitioner to plead and prove actual good faith domicile, such a result could be avoided without the infringement of a protected right. Wymelenberg v. Syman, 328 F. Supp. 1353, 1356. A state judiciary which routinely determines the best interests of the children of the parties, a fair division of the financial resources, and whether a marriage relationship has broken down "to the extent that the legitimate objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved", Iowa Code Section 598.17, should

not find an insurmountable challenge in deciding whether a Petitioner has proved bona fide domicile.

To the argument that the residency requirement prevents surreptitiously obtained divorces without notice to nonresident spouses, reference is made to Iowa Rules of Civil Procedure 60 (i) and 60.1 providing that notice by publication and mailing is sufficient notice to a nonresident spouse for the Iowa courts to obtain jurisdiction over the marital res. If such a procedure is not "surreptitious" for long-time residents with out-of-state spouses, it is not less for newcomers.

5. A fifth asserted interest is to guarantee the protection of the welfare of children affected by the dissolution. But there are other more effective ways to protect such children, and delaying the courts jurisdiction over a hostile family situa-

tion may work a great harm upon the children. Iowa Code Sections 598.11 and 598.12 (1973) provide for temporary orders for the support and maintenance of the children and for the appointment of an attorney to protect the interests of the children. The best interests of any children concerned are more likely to be served by the speedy involvement of the court system than by a year's delay.

6. Another interest - cited by the majority below, 360 F. Supp. at 1184 - is in discouraging the judiciary from interfering in the marriages of nonresidents in whom the state has no interest. But where a petitioner is able to show that she is a good faith resident, the state has an interest in the marriage even though the petitioner has lived in Iowa less than a year. The argument is inconsistent with the fact that under Iowa

Code Section 598.6 (1973) a nonresident petitioner is allowed to seek a dissolution in Iowa, no matter how short the respondent's period of residence may be. See Sosna v. Iowa, 360 F. Supp. 1182, 1188 (McManus, J., dissenting).

7. It has been argued that the state has an interest in protecting its tax-supported institutions from use by non-residents. Again, a requirement that petitioners satisfy the court that they are domiciled in the state in good faith is a more precise method of protecting the state treasury with the least interference in the exercise of constitutional liberties. Actual non-residents and persons whose residence is maintained solely for the purpose of obtaining a dissolution would still be denied access to the state-financed judicial machinery. See Larson v. Gallogly, 361 F. Supp. 305 (D.R.I.

1973). In Mon Chi Hueng Au v. Lum, 360 F. Supp. 219, 222 (D. Ha. 1973), a three-judge court held:

> "Absolute durational residence requirements on divorce are, nevertheless, constitutionally flawed in that their efficacy in isolating those nondomiciliaries most likely to assault divorce courts is accompanied by an inability to segregate bona fide domiciliaries from those so isolated."

8. It is conceivable that a state's interest in limiting the jurisdiction of its courts so that their judgments will be accorded full effect in other jurisdictions could be held to be a compelling interest. A durational residency requirement may insure that the court has jurisdiction of the person of at least one of the parties. However, this interest can be protected as

well by requiring petitioners to show bona fide domicile as by requiring a one-year residence period. The Supreme Court has held that the courts of a state in which one party is domiciled are empowered to issue a decree terminating the marital status and that such a decree must be accorded full faith and credit by all other states. Williams v. North Carolina, 317 U.S. 287, 63 S. Ct. 207 (1942). If the jurisdictional interest can be protected by requiring a showing of domicile, and if domicile can be established in a shorter period than one year, then a one-year residence requirement is impermissibly overbroad, as it must affect the rights of some persons who could prove domicile but who have resided in the state less than one year. Dunn v. Blumstein 405 U.S., 330, 343, 351 92 S. Ct. 995, 1003, 1007.

It is well established that domicile is shown by physical presence plus animus manendi, the intention of remaining. Newton v. Mahoning County Com'rs, 100 U.S. 548 (1879). In Iowa, the point is clearly settled. See, for example, Garberson v. Garberson, 82 F. Supp. 706 (D. Ia. 1949), holding that "domicile" is the concurrence of physical presence in a place with present intention of residing there indefinitely; Anderson v. Blakesby, 136 N.W. 210, 155 Iowa 430 (1929); and In re Colburn's Estate, 173 N.W. 35, 186 Iowa 590 (1919).

The intention of remaining in a place can be shown by objective indicia such as purchasing or renting a home, obtaining a car or driver's license, registering to vote, seeking employment, and entering one's children in school. Dunn v. Blumstein, 405 U.S. 330, 352, 92 S. Ct. 995, 1008; McCay v. South Dakota, 336 F.

Supp. 1244, 1247 n.3 (1974).

At the time her petition was filed, the Appellant herein was physically present in the State of Iowa and attempted to prove by tangible evidence her intent to remain. Her children attend Iowa schools, she has voted in Iowa, she has a permanent place of residence in Iowa, and she is permanently employed in Iowa. The only judge to address this issue was satisfied that bona fide domicile was shown. Sosna v. Iowa, 360 F. Supp. 1182, 1186 n.2 (McManus, J., dissenting). The constitutionally permissible requirements for the court's jurisdiction over the Appellant's person and marital status were satisfied, but her petition was dismissed because she had been present in Iowa less than a year.

DIVISION II

THE ONE-YEAR RESIDENCE REQUIREMENT CONSTITUTES A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BY DENYING TO PERSONS WHO SATISFY CONSTITUTIONAL JURISDICTIONAL REQUIREMENTS FREE ACCESS TO THE COURTS, ABRIDGING THEIR FIRST AMENMENT RIGHT TO PETITION THE GOVERNMENT FOR REDRESS OF GRIEVANCES.

Because the state monopolizes the procedural means for terminating a marriage, a statutory suspension of access to that procedure effectively cuts off an individual's opportunity to obtain relief from marital grievances. In Griffin v. Illinois, the Supreme Court held that once a state opens its courts to criminal appeals it cannot discriminate against those unable to pay the cost of a transcript, 351 U.S. 12 (1956). It has also been held that a purpose of the Fourteenth Amendment

was to give the people "like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts...." Barbier v. Connolly, 113 U.S. 27, 31 (1885). See also Truax v. Corrigan, 257 U.S. 312 (1921). The Griffin rationale was applied to divorce actions in Boddie v. Conn., where the Supreme Court held that requiring an indigent Plaintiff to pay the court costs of a divorce action violates the Due Process requirement because of the "basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship....," 401 U.S. 371, 374, 91 S. Ct. 780, 784 (1971).

In Boddie the Court set the standard of review when access to the divorce

courts is denied to a class of persons:

> "Prior cases establish, first that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." 401 U.S. at 377, 91 S. Ct. at 785.

> "Drawing upon the principles established by the cases just canvassed, we conclude that the State's refusal to admit these appellants to its courts, the sole means in Connecticut for obtaining a divorce, must be regarded as the equivalent of denying them an opportunity to be heard upon their claimed right to a dissolution of their marriages, and, in the absence of a sufficient contervailing

> jusitification for the State's action, a denial of due process." (footnote omitted) 401 U.S. at 380, 91 S. Ct. at 787.

It is not clear whether the countervailing-state-interest-of-overriding-significance test is a different standard from the compelling-state-interest test. But, if there is a difference, it is clear that where they arise to challenge the same asserted state jusitification, the stricter test must be satisfied. In Wymelenberg v. Syman, 328 F. Supp. 1353, 1365, the court concluded its opinion:

> "In that (the residence requirement status) precludes 'the adjustment of a fundamental human relationship,' Boddie v. Connecticut, 401 U.S. at 383 by 'bona fide' Wisconsin residents for as long as two years simply 'because they have recently moved

into the jurisdiction,' Shapiro v. Thompson, 394 U.S. at 634, the prior mandates of the United States Supreme Court compel us to find, whether judged by the equal protection clause 'compelling interest' test or by the due process clause 'overriding significance' test, that (the statutory waiting period) constitutes an unconstitutional impingement upon the Fourteenth Amendment of the United States Constitution."

Where no state justification which has been shown or which is self-evident measures up to the compelling-state-interest test in light of the less restrictive available alternative of requiring the pleading and proving of bona fide domicile, it would be a semantic parody to claim that an overridingly significant countervailing state interest is shown among

those considered.

The Appellant herein was denied access to the only available means of seeking relief from her marital greivances for the sole reason that she had moved into the state more recently than a year before filing her petition. As in Boddie, where the payment of a filing fee constituted an absolute precondition to access to the divorce court, the Iowa residency requirement presents an impenetrable obstacle to the newly-arrived petitioner. In Boddie, access could be gained only by accumulating the filing fee, in the instant case, only by the passage of time. In both cases, persons with genuine grievances are prevented from presenting them to the only body authorized to give relief. In both cases, the state's reasons are inadequate to justify this result.

In Boddie, the Court was careful to

note that, "we go no further than necessary to dispose of the case before us, a case where the bona fides of both appellants' indigency and desire for divorce are beyond dispute". 401 U.S. at 382, 91 S. Ct. at 788. In the instant case the bona fides of Appellant's desire for divorce and domicile are beyond dispute, and the limited rule of Boddie should apply:

> "Thus we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so." 401 U.S. at 383, 93 S. Ct. at 789.

In Vlandis v. Kline, _____ U.S. _____, 91 S. Ct. 2230 (1973), the Supreme Court found that the Due Process Clause of

the Fourteenth Amendment was violated by a statute which created an irrebuttable presumption that any state university student who was a nonresident at the time of admission remainded a nonresident for the entire period of his attendance, where the presumption was often not true in fact and where there was a reasonable means of determining when the presumption of nonresidency did not suit a specific instance.

In Heinar v. Donnan, 285 U.S. 312 at 329, 52 S. Ct. 358 at 362 (1932) The Supreme Court emphasized that it had "held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the Due Process Clause of the Fourteenth Amendment." For more recent support, see Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208 (1972; Bell v. Burson, 402 U.S. 535, 91 S. Ct. 1586 (1971).

The instant case is similar to Vlandis in that the challenged statute creates an irrebuttable presumption of nonresidency which is often not true in fact and for which reasonable means exist to rebut the presumption. By conclusively presuming that any person who has not lived in Iowa for a year is a nonresident and by not affording an opportunity for a petitioner to show that the presumption is untrue for her case, the residency statute deprives such a petitioner of a significant liberty without the guaranteed protection of due process.

In Vlandis, ____ U.S. at _____, 93 S. Ct. at 2237, the Court said:

> "We hold only that a permanent rebuttable presumption of nonresidence .... is violative of the Due Process Clause because it provides no opportunity for students who applied from

> out of state to demonstrate that they have become bona fide Connecticut residents."

Although the Iowa statute is a one-year, and not a permanent, presumption, the violation of due process is clear. In Dunn v. Blumstein, 405 U.S. at 352, 92 S. Ct. at 1008, the Court said:

> "But since Tennessee's presumption from failure to meet the durational residence requirements is conclusive, a showing of actual bona fide residence is irrelevant, even though such a showing would fully serve the State's purposes embodied in the presumption and would achieve those purposes with far less drastic impact on constitutionally protected interests." (footnote omitted)

Through Chapter 598 of the Code of Iowa (1973) the State of Iowa has created

a monopoly over the means for adjusting the marriage relationship. The residency requirement of Sections 598.6 and 598.9 denied the Appellant access to that monopolized means until she could satisfy that threshhold obligation. No meaningful alternative was available, since the residency requirement is also applied to actions for annulment and separate maintenance. Iowa Code Section 598.28 (1973). This denial of access to the court is not justified by any state interest which has been asserted or which is self-evident and which could satisfy the strict due process standard of review in light of the less restrictive alternative available. In addition, the Appellant has been denied access to the court through a state-created presumption of law which is untrue for her case but which she is not given an opportunity to rebut. She has been denied her

right to petition the courts for redress of her marital grievances under conditions which disregard her Fourteenth Amendment guarantee of Due Process.

DIVISION III

THE HOLDINGS OF YOUNGER V. HARRIS AND RELATED CASES DO NOT IMPLY THAT THE U.S. DISTRICT COURT BELOW SHOULD NOT HAVE PROCEEDED TO THE MERITS OF THE CONSTITUTIONAL ISSUES PRESENTED.

Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746 (1971), and its companion cases reaffirmed certain principles controlling the use of federal court equity power to intervene in threatened or pending state criminal cases. In general, it was held that, unless irreparable harm appears from a showing of bad faith enforcement or harassment, principles of equity jurisprudence, comity, and federalism preclude the use of a federal injunction restrain-

ing enforcement of a disputed state criminal statute. In the companion case of Samuels v. Mackell , 401 U.S. 65, 91 S. Ct. 764 (1971), it was held that where a state prosecution is pending, the same considerations which preclude the issuance of an injunction also preclude the use of a declaratory judgment unless unusual circumstances are shown.

Federal courts have long been reluctant to interfere in the state criminal process, and the guiding principle from the Younger cases may be that federal courts should refuse to act whenever it is clear that the constitutional claims of the federal plaintiff can be adequately adjudicated in the state criminal proceeding.

The issue now presented by the Court in its note of probable jurisdiction is whether the foregoing principles should have led the District Court below to conclude that it was improper to proceed to

the merits. Such a conclusion is not clearly directed by prior decisions of the Supreme Court.

The instant case presents a factual situation critically dissimilar to the circumstances of the Younger cases. In her Complaint (A.1) the Appellant sought injunctive and declaratory relief under 42 U.S.C. Section 1983, 28 U.S.C. Section 1343 (3) and 28 U.S.C. Section 2201. Her petition for a dissolution of marriage had been dismissed by the District Court of Iowa for want of jurisdiction after presentation of her constitutional contentions to that court. There was no action pending. The Complaint did not ask that a pending state court action be stayed or enjoined; it asked that Sections 598.6 and 598.9 of the Code of Iowa be declared unconstitutional and that future enforcement of those sections by the state be

enjoined. The disputed state statutes are civil and not criminal. And the Appellant seeks not to stop a court proceeding, but to be allowed to start one.

In decisions since Younger, the Court has made it clear that the considerations warranting restraint in Younger do not apply where there is no contemporaneously pending state court proceeding. Steffel v. Thompson, _____ U.S. _____, 94 S. Ct. 1209, 1217 (1974): Lake Carriers' Assoc. v. Mac Mullan, 406 U.S. 498, 509, 92 S. Ct. 1749, 1757 (1972). In Lake Carriers', speaking of the Younger decisions, the Court said:

> "The decisions there were premised on considerations of equity practice and comity in our federal system that have little force in the absence of a pending state proceeding. In that circumstance, exercise of federal court jurisdiction ordinarily is appropriate if the conditions for declaratory or injunctive relief are met." 406 U.S. at 509, 92 S. Ct. at 1757.

If these decisions are to have effect, the issue in the instant case, where there is no pending state court proceeding, becomes whether there exist proper circumstances for declaratory or injunctive relief. Generally, an injunction to restrain enforcement of an unconstitutional state law should not issue unless it is shown that the moving party has no adequate remedy at law and that he will suffer irreparable harm if denied equitable relief. Younger v. Harris, 401 U.S. 37, 43, 91 S. Ct. 746, 750; Douglas v. City of Jeannette, 319 U.S. 157, 63 S. Ct. 817 (1943). However, the requirement that irreparable harm be demonstrated does not apply to declaratory judgments, Steffel v.

Thompson, ____ U.S. _____, 94 S. Ct. 1209, 1222; nor does the need for a lack of an alternative legal remedy, Perez v. Ledesma, 401 U.S. 82, 123, 91 S. Ct. 674, 696 (1971).

Irreparable harm is damage which cannot be adequately compensated by a judgment of law or by money consideration, either because of the nature of the injury or the impossibility of accurately estimating the damage. Ohio Oil Co. v. Conway, 279 U.S. 813, 49 S. Ct. 256; Harrison-Pottawattamie Drainage District v. Iowa, 156 N.W. 2d 835 (1968). To forego constitutionally protected activity in order to avoid arrest is to be harmed beyond pecuniary compensation. See Steffel v. Thompson, 94 S. Ct. 1209, 1218 n.12. Sufficient incompensable harm to warrant injunctive relief should be apparent when a constitutionally flawed state statute

has the direct effect of prohibiting the adjustment and reconstruction of the most fundamental aspect of the Appellant's life, and when that effect is not only unnecessary but an invidious penalty upon the exercise of another essential liberty. The Appellant has not been forced to choose whether to forego protected activity. She has had the choice withdrawn as a penalty for engaging in other protected activity. The unjustified suspension of the status of the Appellant and her children cannot be compensated. Justice delayed is justice denied. In Mitchum v. Foster, 407 U.S. 225, 242, 92 S. Ct. 2151, 2162, (1972), the Supreme Court said:

> "And this Court long ago recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great immediate, and irrepar-

able loss of a person's constitutional rights. Ex Parte Young, 209 U.S. 123, 23 S. Ct. 441, 52 L. Ed. 714; ...."

The District Court properly did not refrain from considering the merits on the ground that the issue should have been presented in a state court appeal. Discussing the role of federal courts in Zwickler v. Koota, 389 U.S. 241, 248, 88 S. Ct. 391, 395 (1967), the Supreme Court said:

> "In thus expanding federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility,

> equally with the federal courts, *** to guard, enforce and protect every right granted or secured by the constitution of the United States ***'. Robb v. Connolly, 111 U.S. 624, 637, 4 S. Ct. 544, 551, 28 L. Ed. 542. 'We yet like to believe that whenever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.' Stapleton v. Mitchell, D. C., 60 F. Supp. 51, 55;..."

It is not necessary to exhaust state judicial remedies before seeking federal relief. "It is no answer that the State has a law which, if enforced, would give relief. The federal remedy is supplemen-

tary to the state remedy, and the latter need not be first sought and refused before the federal one is involved." Monroe v. Pape, 365 U.S. 167, 183, 81 S. Ct. 473, 482 (1961). See also Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S. Ct. 507, 510 (1971).

The Younger decisions were motivated by a desire to minimize federal interference in state criminal proceedings. See, for example, Younger v. Harris, 401 U.S. 37, 55, 91 S. Ct. 746, 757 (Stewart, J., concurring). The implications of the Younger doctrine of restraint for civil proceedings have never been articulated. See, Mitchum v. Foster, 407 U.S. 225, 244, 92 S. Ct. 2151, 2163 (Burger, C. J., concurring). The considerations are distinctly different. In the instant case the state was not a party to the action which the Appellant sought to commence. Equitable

relief will not result in an interference with the orderly operation of the state judicial and prosecutorial machinery. The cases have emphasized a concern for interrupting criminal proceedings. Disregarding the fact that the Appellant does not seek to interrupt any ongoing proceeding, the consequences of federal intervention in a civil proceeding are of much less direct concern to the state and the public interest than intervention in the criminal process.

It has been commented that the Younger decisions present the proposition that equitable relief is not properly invoked where the moving party claims only that he is "chilled" in the exercise of protected liberties because of the mere existence of an unconstitutional law. E.g., Note, Implications of the Younger Cases for the Availability of Federal

Equitable Relief When No State Prosecution is Pending, 72 Col L. Rev. 874 (1972). The Appellant in the instant case presents a claim of more substantial harm than a "chilling" effect. If the Appellant had considered the Iowa residency requirement before entering the state and had decided not to move to Iowa for that reason, the claim might be a "chilling" effect upon her right to travel. But, in fact, she exercised her right to travel and the harm threatened by the existence of the residency requirement was accomplished by her exclusion from the court system.

A parallel in criminal proceedings may be attempted. The status of the Appellant's case is as though the threatened prosecution had been carried out and she has been convicted under a flawed statute. She now seeks review of

that statute under a rough equivalent of a habeas corpus action. The Appellant's federal claim was brought under 42 U.S.C. Section 1983 which is a unique statutory escape mechanism for those who are trapped by an unconstitutional operation of state authority.

The special status of actions under 42 U.S.C. Section 1983 has been made clear. In Mitchum v. Foster, 407 U.S. 225, 243, 92 S. Ct. 2151, 2162, the Court held that Section 1983 falls within the "expressly authorized" exception of the anti-injunction act, 28 U.S.C. Section 2283. In its opinion, the Court said:

> "Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th Century when the anti-injunction statute was enacted. The very purpose of

Section 1983 was to interpose the federal courts between the State and the people, as guardians of the people's federal rights -- to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial'. Ex Parte Virginia, 100 U.S. at 346, 25 L. Ed. 676. In carrying out that purpose, Congress plainly authorized the federal courts to issue injunctions in Section 1983 actions, by expressly authorizing a 'suit in equity' as one of the means of redress." 407 U.S. at 242, 92 S. Ct. at 2162.

The language of the Court's note of probable jurisdiction suggests a connection with the holding of Samuels v. Mackell, 401 U.S. 66, 91 S. Ct. 764,

which held not merely that an injunction was improper, but that relief should have been denied without consideration of the merits. Samuels involved pending state prosecutions, and the Court found the reasoning of Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 63 S. Ct. 1070 (1943), to be controlling. However, Great Lakes involved an attempt to have enjoined a state tax collection; and, as in Samuels, the Court held that there was an adequate remedy available in the state courts. In Samuels, as in Younger, the Court found that the criminal defendant could raise his constitutional claims in the course of his defense. The situations are not like the instant case, where (1) there is no pending state proceeding, and (2) the Appellant's constitutional claims were raised and denied. The Appellant now looks to the federal

court for equitable relief from unconstitutional judicial action under color of state law.

The narrow question of whether the District Court should have proceeded to the merits of the constitutional issues must be answered in the affirmative. The question is not the same as whether an injunction is proper in this case. Under Steffel v. Thompson and Lake Carriers' Association v. Mac Mullan a request for declaratory relief is properly considered where there will be no interference with an ongoing state proceeding. Whether it is an appropriate instance for the issuance of injunctive relief as well as a declaratory judgment is a separate question. It is an unsettled issue whether declaratory judgments carry sufficient effect to guarantee the protection of the liberties in question. Steffel v.

Thompson, 94 S. Ct. 1224 (White, J., concurring), 94 S. Ct. 1226 (Rehnquist, J., concurring); Perez v. Ledesma, 401 U.S. 82, 125, 91 S. Ct. 674, 697. If a litigant must take his declaratory judgment into the state court, hoping that the state court will give the federal statement of rights some res judicata effect, the litigant has been afforded something less than the swift and sure protection of the federal courts.

It is interesting to note that the case of Boddie v. Connecticut, 401 U.S. 371, 91 S. Ct. 780 (1971), which involved a situation remarkably similar to the instant case, was decided only a week after the Younger Cases. Boddie was a class action appeal from a three-judge court which denied declaratory and injunctive relief. The Supreme Court reversed on the merits without mention of an issue

arising from the principles of Younger.

To refuse to consider the merits of the constitutional issues herein would conflict with the following language from Steffel v. Thompson, 94 S. Ct. at 1222:

> "In the instant case, principles of federalism not only do not preclude federal intervention, they compel it. Requiring the federal courts totally to step aside when no state criminal prosecution is pending against the federal plaintiff would turn federalism on its head. When federal claims are premised on 42 U.S.C. Section 1983 and 28 U.S.C. Section 1343 (3) -- as they are here -- we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional

> rights. See, e.g., McNeese v. Board of Education, 373 U.S. 668, 83 S. Ct. 1433, 10 L. Ed. 2d 622 (1963); Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961). But exhaustion of state remedies is precisely what would be required if both federal injunctive and declaratory relief were unavailable in a case where no prosecution had commenced."

Because the body of personal liberties which have developed under our Constitution and federal system cannot flourish and be vigilantly protected without a strong and unshackled federal judiciary, the Younger decisions should be narrowly construed.

CONCLUSION

The Appellant is entitled to a declaratory judgement finding that the Iowa dissoution of marriage residency requirement violates her Fourteenth Amendment rights and to a permanent injunction enjoining future enforcement of the unconstitutional sections of statute.

Respectfully submitted,

Paul E. Kempter
James H. Reynolds
Fred H. McCaw

630 Fischer Building
Dubuque, Iowa 52001

Attorneys for Appellant

Supreme Court, U. S.
FILED
JUN 19 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-762

CAROL MAUREEN SOSNA,
on behalf of herself and all others
similarly situated,

Appellant,

v.

THE STATE OF IOWA, and A.L. KECK,
individually, and as judge of the
District Court of the State of Iowa
in and for Jackson County,

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF IOWA

BRIEF OF APPELLEE

RICHARD C. TURNER
Attorney General of Iowa

ELIZABETH A. NOLAN
Assistant Attorney General

GEORGE W. MURRAY
Special Assistant Attorney General

State Capitol
Des Moines, Iowa 50310

Attorneys for Appellees

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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IN THE

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THE STATE OF IOWA, and A.L. KECK,
individually, and as judge of the
District Court of the State of Iowa
in and for Jackson County,

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF IOWA

BRIEF OF APPELLEE

The Appellee agrees with Appellants' Statement of Jurisdiction, Constitutional Provisions and Statutes, the questions presented for review which were decided by the lower court, and the form of the question presented for review, on the abstention issue referred to by this court in its Order entered February 19, 1974 noting probable jurisdiction.

STATEMENT OF THE CASE

Appellee agrees with Appellants' Statement of the Case, but some additional background facts may be of some assistance to the court and in essence, these facts may be found in the Appendix on file herein, pages 28-30, Appellants' Answers to Interrogatories.

The plaintiff, herein, Carol Maureen Sosna, commenced her action for a dissolution of marriage in the District Court in and for Jackson County, Iowa, under the provisions of Chapter 598, Code of Iowa, 1971, on or about September 22, 1972, which was approximately *one month* after her arrival in Iowa. In said petition for dissolution the petitioner alleged that her husband, Michael Sosna, respondent in said case, lived at a New York address in New York City. Petitioner further alleged that she was a resident of Green Island, Jackson County, but that she had not been a resident of the State of Iowa for the year last preceeding her filing of her petition and in said petition she requested that the court waive the residency requirement for the reason that it violated her constitutionally protected right to travel.

Michael Sosna was served personally with an original notice at Clinton, Iowa on September 20, 1972. In response to defendant's interrogatories, the plaintiff states that Michael Sosna was physically within the State of Iowa for personal reasons of his own, namely to visit the children of the marriage. On October 24, 1972, Michael Sosna, as respondent in said action, filed a Special Appearance in the District Court alleging that he was a resident of the State of New York, that the Iowa District Court had no authority to waive the statutory requirement that the petitioner reside in Iowa for the year prior to her commencing her action and that therefore, under the provisions of Iowa Code

Section 598.6 that the court did not have jurisdiction of this subject matter nor of the person. Counsel for the plaintiff filed his resistence to the Special Appearance on November 1, 1972, and upon order of the court the case was set down for hearing on November 20, 1972.

On December 27, 1972, Judge A.L. Keck, one of the defendants in this case, filed his ruling on respondent's Special Appearance, wherein he sustained defendant's Special Appearance and dismissed plaintiff's petition for dissolution of marriage.

Appellant, Carol Maureen Sosna, is a young lady, twenty-seven years of age, was born in the State of Illinois, was married in the State of Michigan at age nineteen, she and her husband were domiciled in the State of New York from approximately October, 1967 until August, 1972. Three minor children were born to this marriage who were transported by the plaintiff from their home in New York City to the State of Iowa in August, 1972. The Plaintiff separated from her husband in approximately August, 1971, and, as she states, at that time her husband was guilty of mental cruelty and adultery and both she and her husband discussed a legal separation with their respective attorneys in the State of New York. Their separation lasted for a period of approximately one year and no action for divorce was commenced by either of the parties of the marriage. She has advised that friends of hers lived in Clinton and encouraged her to move to Iowa and approximately *one month* after her arrival in the State of Iowa she commenced her action for dissolution of marriage in the District Court of Jackson County, Iowa.

In her petition in the District Court of Jackson County, the plaintiff has alleged that her petition was filed in good faith, that she seeks custody of the minor

children, that her husband should be required to pay a reasonable sum as permanent child support, that her husband should be required to pay the debts and obligations incurred by the parties during their marriage, that she be awarded the household goods, furniture and furnishings accumulated by the parties during the marriage and that she be awarded the bank accounts now owned by the parties. She states that the proceeds of the sale of their home in the State of New York are being held in escrow and that they can be divided only upon the dissolution of her marriage. The plaintiff further advises that she has never discussed reconciliation with her husband and he has expressed no intention of moving to Iowa, she is short of funds and is presently receiving food stamps and that she receives some income from a photographic studio in which she has some financial interest. It is planned that this business will be expanded to include an "organic food" sales place.

ARGUMENT

DIVISION I

THE STATE OF IOWA IS A QUASI PARTY OR A PARTY BY IMPLICATION TO ANY ACTION SEEKING THE DISSOLUTION OF A MARRIAGE CONTRACT AND HAS A DIRECT INTEREST IN AN ACTION BY PARTIES RESIDENT OR NON-RESIDENT. THIS INTEREST IS BEST PROTECTED FROM THE STATE'S POINT OF VIEW BY A DURATIONAL RESIDENCY REQUIREMENT. THE ONE-YEAR RESIDENCY REQUIREMENT SUFFICIENTLY MEETS BOTH THE TRADITIONAL STANDARD OF THE EQUAL PROTECTION CLAUSE AND ALSO MEETS THE REQUIREMENTS OF THE STRICTER STANDARD OF A COMPELLING STATE INTEREST.

The nature of a divorce or a dissolution of marriage is best stated by the following quote from American Jurisprudence 2d:

> "The right to apply for or obtain a divorce is not a natural one, but is accorded only by reason of statute, and the state has the right to determine who are entitled to use its courts for that purpose and upon what conditions they may do so. Divorce is not among the inalienable rights of man or the rights granted by Magna Charta, the federal or state constitution, or the common law; except at the will of, and subject to any restrictions imposed by, the legislature, divorce has never been recognized as one of the guaranteed privileges of the citizen." 24 Am. Jur. 2d 180.

The public policy in relationship to divorce can generally be stated as follows:

> "Marriage is a relation in which the public is deeply interested, and is subject to proper regulation and control by the state or sovereignty in which it is assumed or exists. The public policy relating to marriage is to foster and protect it, to make it a permanent and public institution, and to prevent separation. This policy finds expression in probably every state in this country in legislative enactments designed to prevent the sundering of the marriage ties for slight or trival causes, or by the agreement of the husband and wife, or in any case except on full and satisfactory proof of such facts as the legislature has declared to be cause for divorce. Such provisions find their justification in this well-recognized interest of the state in the permanency of the marriage relation. The right to a divorce exists by legislative grant, only the marriage contract in this respect being regulated and controlled by the sovereign power, and not being, like ordinary contracts, subject to dissolution by the mutual consent of the contracting parties. As said by the United States Supreme Court: 'Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.' " *Maynard v. Hill*, 125 U.S. 190, 31 L.ed. 654, 8 S. Ct. 723. 24 Am. Jur. 2d 184.

The State of Iowa subscribes to this general public policy.

> "The integrity and permanence of the marital relation is of such vital importance to the welfare of society and to the public generally that the sovereignty or State has always deeply interested itself in all matters pertaining to the dissolution of that relation. While the suit for divorce is nominally between the two parties, the State is always a quasi party. As said in Walker v. Walker, 205 Iowa 395, 398, 217 N.W. 883: 885: 'The nominal plaintiff and defendant are not the only parties to the suit. The state and public are parties by implication.' " *Hopping v. Hopping*, 10 N.W.2d 87 (p. 89-90).

Public policy in Iowa in reference to dissolution of marriage has undergone recent changes. Iowa has become one of the more liberal states in the family law area by enacting its no-fault dissolution of marriage act to replace its divorce statutes. These new statutes are the product of the 63rd General Assembly, Second Session, which law became effective on July 1, 1970. Our present statutes are largely the work of a divorce laws study committee created by the legislature which committee was composed of legislators, lawyers, a priest, a minister and a district court judge. 20 Drake Law Review 211-226. There is no need to go into various changes in the new dissolution of marriage law now current in the State of Iowa, but it is interesting to note that §§598.6 and 598.9, the sections alleged unconstitutional by the Plaintiff herein, were left unchanged. In the words of the author of the above cited Drake Law Review article:

> "Iowa has been careful to retain the requirement that the residence of at least one party be in this state as a necessary basis for assertion of jurisdiction by its courts and those dissolution of marriage actions. Failure to prove the allegations of residence results in dismissal of the action."

From this we may assume that the residence requirements were considered and discussed by the committee and can probably assume that the alleged "arbitrary" one-year requirement was considered by the legislature. Most states have some residency requirements as the basis for divorce or dissolution of marriage and these requirements may vary from six weeks to two years. Am. Jur. Desk Book 2d, 1972, Cumulative Supplement. A random count indicates that over half of the states fall in the one-year classification.

The factual situation surrounding the presence of the Appellant in Iowa must be examined in the light of the interest of the State of Iowa in a dissolution proceeding as evidenced by the preceding public policy of the state. When so examined, it is the conclusion of the Appellee that a reasonable state of facts does exist which reasonably justify a durational residency requirement and that therefore, the statute does not deny equal protection under the traditional tests.

However, the Appellant has alleged that her constitutional "right to travel", being a fundamental right, it is violated by the residency requirements in Iowa. In that reference, we will borrow a conclusion reached by the court in *Whitehead v. Whitehead*, (1972), 402 Pac.2d 939, p. 942:

> "It is evident the plaintiff filed a complaint in this case in the light of the decision in *Shapiro v. Thompson*, 394 U.S. 618, 89 S. Ct. 1322, 22 L.Ed.2d 600 (1969)."

In addition to *Shapiro*, the Appellant relies heavily on this court's decision in *Dunn v. Blumstein*, 405 U.S. 330, 92 S. Ct. 995, 31 L.Ed.2d 274. *Shapiro* was a welfare case and *Dunn* was a voting rights case. The Honorable Judge Roy L. Stephenson, Circuit Judge, in his opinion, below, correctly pointed out the distinction between these type cases and the case where the issue is

a dissolution of marriage. (Jurisdictional Statement Appendix A, pp. 3-5).

The District Court in the State of Florida, the Honorable Judge Hodges, reached much the same conclusion as did Judge Stephenson in stating that the penalty on interstate travel was de minimis and to the extent that such penalty does exist, it is justified by a compelling state interest:

> "In summary, it may be said beyond peradventure that many state residency requirements have been born or perpetuated as a result of legislative habit or an occasional display of provincialism with little or no deliberate thought being given to the purpose or lack of purpose involved, or whether other provisions in the particular statutory scheme were already sufficient to accomplish that purpose. This is not so in the case of divorce. Residency requirements are the *sine qua non* of domicile, and domicile is peculiarly essential, not merely because of technical or abstract jurisdictional considerations relevant only to the state's internal policies or procedures, but because a divorce as a matter of practical and constitutional necessity can be obtained ex parte on the basis of constructive service of process with permanent future effect upon the lives and property of third persons as well as the rights of sister states. The state must go slow, it must be careful, and when it undertakes to act, it owes a duty to other states and other affected parties to make a record in support of its judgment that will withstand collateral attack and merit full faith and credit. The Florida residency requirement, proof of which must be corroborated, is not a 'drastic means' of endeavoring to obtain that vital objective either in terms of the length of the residency period or in its effect upon the right it qualifies. Time is the essence of an abortion or an election or the receipt

of welfare assistance (upon which the necessities of life may depend), but it is virtually irrelevant in the case of divorce. The penalty to interstate travel is *de minimis*, and to the extent such penalty does exist, it is justified by a compelling state interest." 359 Fed.Supp. 1225, 1234. *Shiffman and Makres, Plaintiffs, v. Askew* (M.D. Florida; Tampa Division; June 1, 1973; 359 F.Supp. 1225 (1973))

In the past few years the courts all over the country have been concerned with the issue presented by this case. Much has been written and the philosophy of the durational residency requirement as an objective test for proof of domicile has been upheld by many of the courts where they applied the traditional standard test or the stricter compelling state interest test. The discussions by the courts in the following cases, in the opinion of the Appellee, clearly negate the Appellant's position herein: see, *Place v. Place*, 129 Vt. 236, 278 A.2d 710 (1971); *Whitehead v. Whitehead*, supra; *Coleman v. Coleman*, 32 Ohio St.2d 155, 291 N.E.2d 530 (1972); *Shiffman v. Askew*, supra; *Davis v. Davis*, Minnesota, 210 N.W.2d 221 (1973).

DIVISION II

NEITHER THE FIRST AMENDMENT RIGHT TO PETITION THE GOVERNMENT FOR REDRESS OF GRIEVANCES OR THE DUE PROCESS RIGHT OF THE FOURTEENTH AMENDMENT ARE VIOLATED BY ONE-YEAR RESIDENCE REQUIREMENT IN DISSOLUTION OF MARRIAGE CASES.

The Appellant would equate the factual situation of this case with that found in *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780 (1971). In *Boddie*, plaintiffs were welfare recipients who were barred from having their divorce actions heard by the state court, having

jurisdiction over divorce, because of the refusal of the court officers to accept their complaints for filing without prepayment of the court costs. The validity of a durational residential requirement was not at issue in the case. However, the Appellant appears to argue that the cases are the same when he states, "as in *Boddie*, where the payment of the filing fee constituted an absolute pre-condition to access to the divorce court, the Iowa residency requirement presents an impenetrable obstacle to the newly arrived petitioner". *Boddie* clearly held that due process prohibits any state from denying indigents access to its divorce courts solely because of inability to pay court costs. The classification struck down in said case was one based on wealth, not residency or domicile. The court in *Whitehead*, supra, clearly distinguished *Boddie* with its wealth classification from the residency requirement by stating:

> "This court has held that the residential requirement for divorce in our statute is jurisdictional * * * the word 'jurisdictional', as used in that connection, does not have reference to the jurisdiction of the court to hear and act on a case; rather, it refers to jurisdiction which every state must have over the marriage relationship as a pre-requisite to exercising its control over divorce. * * * In this respect it is similar to Section 580-41, which sets forth grounds for divorce. An applicant for divorce who fails to prove a ground for divorce will not be granted a divorce because of failure to satisfy a substantive requirement for divorce. Similarly, an applicant who fails to prove that he has been domiciled or has been physically present in the state for one year, will not be able to obtain a divorce because of failure to satisfy a substantive requirement, not because he is denied access to court.
>
> "Thus, we do not think that *Boddie* is relevant to the determination of validity of the residential requirement for divorce * * * "

In Iowa, the same result must be reached. In *Williamson v. Williamson*, 1917, 179 Iowa 489, 161 N.W. 482, the court stated as follows:

> "That a bonafide residence is essential to confer jurisdiction has been the rule of this court since *Hines v. Hines*, 1 Iowa 36 (1855) * * * In other words, such a residence is essential to the jurisdiction of the court."

In a more recent case, *Davis v. Davis*, (1973), 210 N.W.2d 221, the Minnesota court cited *Whitehead*, supra, for the same reason, stating:

> "We believe that *Boddie* is clearly distinguishable since the indigents were permanently (or at least as long as they were indigent) barred from obtaining access to the divorce court. Here plaintiff is not denied access to the courts, since access is only *temporarily* delayed." [emphasis ours]

As stated by Judge Stephenson in his opinion below:

> "Unlike voting or welfare, the concept of divorce is not a constitutional right, nor is it a basic necessity to survival."

This principle is enlarged both in *Whitehead* and in *Shiffman* in the language of Judge Hodges when he stated:

> "Time is the essence of an abortion or an election or the receipt of welfare assistance (upon which the necessities of life may depend), but it is virtually irrelevant in the case of divorce."

The record in this case clearly shows that the Appellant was not denied access to the court by reason of any suspect classification based upon wealth, nor were the doors of the court house closed to her permanently. Domicile is the sine qua non of a dissolution of marriage proceeding. The one-year durational residency requirement does not discriminate

against the appellant, but serves as a reasonable *objective* standard and is, therefore, not overbroad in its reach.

DIVISION III

THE ABSTENTION DOCTRINE AS APPLIED IN *YOUNGER v. HARRIS* AND RELATED CASES SHOULD ORDINARILY APPLY IN CASES WHERE A STATE STATUTE IS CHALLENGED WITHOUT HAVING FIRST BEEN DETERMINED BY THE HIGHEST COURT IN THE STATE.

The Appellee agrees that ordinarily the Abstention Doctrine has much merit and that federal courts should refrain from passing on the constitutionality of a state statute when that issue has not been final determined by the highest court in the state's jurisdiction. The Appellee, in its Answer, raised this issue (Appendix p. 17(d)) but did not argue the issue on its merits after reviewing the various cases on the legal points involved. In addition to this case, the following cases have been determined by various federal and state courts throughout the nation. See, *Place v. Place*, 129 Vt. 326, 278 A.2d 710 (1971); *Whitehead v. Whitehead*, 53 Hawaii 302, 492 P.2d 939 (1972); *Porter v. Porter*, 112 N.H. 403, 296 A.2d 900 (1972); *Coleman v. Coleman*, 32 Ohio St.2d 155, 291 N.E.2d 530 (1972); *Stottlemyer v. Stottlemyer*, 224 Pa. Super. 123, 302 A.2d 830 (1973); *Shiffman v. Askew*, 359 F. Supp. 1225 (M.D. Fla. 1973); *Wymelenberg v. Syman*, 328 F. Supp. 1353 (E.D. Wis. 1971); *Davis v. Davis*, ___ Minn., ___, 210 N.W.2d 221 (1973); *Mon Chi Heung Au v. Lum*, 360 F. Supp. 219 (D. Hawaii 1973); *Larsen v. Gallogly*, 361 F. Supp. 305 (D.R.I. 1973).

Since the above cases have been decided, three more cases on the same subject matter have recently been decided: *Alaska v. Adams*, 42 L.W. 2611 (May 23, 1974); *Ashley v. Ashley*, 42 L.W. 2612 (May 16, 1974); and *Fiorentino v. Probate Court*, 42 L.W. 2540 (March 29, 1974).

This adds to the total states involved, the states of Alaska, Nebraska and Massachusetts. The total score at this writing appears to be nine in upholding the constitutionality of a durational residency statute and five finding them to be unconstitutional.

While this does not seem to be an organized movement in challenging the durational residency requirement in the field of domestic relations, there does seem to be a great deal of similarity in the cases. There is every possibility that additional cases in this area can be expected.

In view of the above, the three-judge court that decided this case should probably have proceeded to the merits.

CONCLUSION

The decision up for review by the three-judge court below was not unanimous. There is much merit in the dissent of the Honorable Edward J. McManus, particularly in his comments concerning the harshness of the objective test standard, compared to a case-by-case analysis of a subjective standard on the issue of residency or domicile. In the exhaustive opinions of many of the able courts and capable lawyers who have considered the issue of the durational residency requirement, it is apparent that the issue has been well presented. This Appellee can add little to the arguments already presented by both sides, except to state that underlying all of the cases is a fear on the part of the

states best expressed by Judge Reardon in *Fiorentino v. Probate Court*, supra, Massachusetts, in his dissenting opinion. After expressing an opinion that the durational residency requirement was jurisdictional in nature and best serves the commonwealth's interest, he added:

> "The majority, however, holds that there exists a less restrictive means of achieving the commonwealth's interests, namely, a case by case examination of each potential divorce petitioner to determine whether he or she possesses a requisite domiciliary intent to establish jurisdiction. This approach ignores the universally unhappy experience of divorce courts when relying on anything other than strict objective tests. No other sector of the judicial process has been so fraught with sham and deception. The sense of urgency that parties bring to a divorce action frequently overcomes what might normally be an extreme reluctance to lie to a court."

The opinion of the three-judge court below should be affirmed.

Respectfully submitted,

RICHARD C. TURNER
Attorney General of Iowa

ELIZABETH A. NOLAN
Assistant Attorney General

GEORGE W. MURRAY
Special Assistant
Attorney General

State Capitol
Des Moines, Iowa 50310

Attorneys for Appellee

Supreme Court, U. S.
FILED
OCT 15 1974
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-762

CAROL MAUREEN SOSNA, ETC., APPELLANT

V.

THE STATE OF IOWA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA

Docketed November 10, 1973
Probable Jurisdiction Noted February 19, 1974

APPELLANT'S REPLY AND SUPPLEMENTAL BRIEF

PAUL E. KEMPTER
JAMES H. REYNOLDS
FRED H. McCAW
630 Fischer Building
Dubuque, Iowa 52001

Attorneys for Appellant

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III. Other Sources

Averitt, "Federal Section 1983 Actions After State Court Judgment" 44 Colo. L. Rev. 191 (1972) 7

Note: Divisions I and II are joined as a single section composed of a list of cases which is not repeated in this index of citations.

DIVISIONS I AND II

The following list is believed to be a current compilation of reported decisions involving Constitutional challenges to divorce residency requirements.

Cases upholding the constitutionality of durational residency requirements for divorce:

Ashley v. Ashley, 217 N.W. 2d 926 (Nebraska, 1974)

Caizza v. Caizza, 291 So. 2d 569 (Florida, 1974)

Coleman v. Coleman, 291 N.W. 2d 530 (Ohio, 1972)

Davis v. Davis, 210 N.W. 2d 221 (Minnesota, 1973)

Place v. Place, 278 A. 2d 710 (Vermont, 1971)

Porter v. Porter, 296 A. 2d 900 (New Hampshire, 1972)

Shiffman v. Askew, 359 F. Supp. 1225 (M.D. Florida, 1973)

Sosna v. Iowa, 360 F. Supp. 1182 (N.D. Iowa, 1973)

Stottlemyer v. Stottlemyer, 302 A. 2d 830 (Pennsylvania, 1972)

Whitehead v. Whitehead, 492 P. 2d 939 (Hawaii, 1972)

Cases holding that durational residency requirements for divorce are unconstitutional:

Fiorentino v. Probate Court, 310 N.E. 2d 112 (Massachusetts, 1974)

Larsen v. Gallogly, 361 F. Supp. 305 (D. Rhode Island, 1973)

McCay v. South Dakota, 366 F. Supp. 1244 (D. South Dakota, 1973)

Mon Chi Hueng Au v. Lum, 360 F. Supp. 219 (D. Hawaii, 1973)

State v. Adams, 522 P. 2d 1125 (Alaska, 1974)

Wymelenberg v. Syman, 328 F. Supp. 1353 (E.D. Wisconsin, 1971)

DIVISION III

Because Appellee has elected to ignore, in effect, the question presented by the Court in its Note of Probable Jurisdiction, the issues embodied in the question are denied the light of adversary investigation. The following discussion is presented in the interest of fuller scrutiny.

In support of the proposition that the District Court below should not have proceeded to the merits of the Constitutional issues, it could be argued that principles of comity or res judicata preclude federal court determination of constitutional claims previously adjudicated in the state courts. Support for this position may be found in Rooker v. Fidelity Trust Co., 263 U.S. 413, 68 L. Ed. 362 (1923), and in England v. Louisiana Medical Examiners, 375 U.S. 411, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964). Rooker, however, articulates the rule that

a federal district court is without jurisdiction to review a state court determination of a federal Constitutional claim. Here, Appellant sought not to invoke nonexistent appellate jurisdiction, but the original jurisdiction of the federal district court under 42 U.S.C. §§ 1983 and 28 U.S.C. §§ 1343 for the purpose of obtaining equitable relief from a deprivation of rights which was effected by a state court.

England sets forth the requirements for reserving the right to return to the federal district court after being bounced into the state court under the Abstention Doctrine. The rule seems to be that if the litigant "freely and without reservation submits his federal claims for decision by the state courts" 375 U.S. at 419, 11 L. Ed 2d at 447, he cannot return to the federal court for relitigation of his

federal claim.

The instant case involves no question of abstention. The statute under challenge is plainly not susceptible to an interpretation which would avoid the Constitutional issues. There is also no question of a return to the federal court. An action for dissolution of marriage can originate nowhere but in the state district court. It is difficult to imagine initiating a dissolution action under the present Iowa law with as plain a defect as insufficient duration of residency and not informing the state court of the Constitutional objections which led Appellant to believe she had a right to seek a dissolution in spite of the statutory residency requirement. To argue that such a circumstance should subsequently bar Appellant from seeking redress in the federal district court is to worship form and to ignore the mandate of 28 U.S.C.

§§ 1343. In addition, to suggest that the state district court's disposition of Appellant's petition amounted to a full litigation of the Constitutional issues is a painful hyperflexion of reason. In the state district court's own memorandum decision (Jurisdictional Statement, Appendix B, P.4) it is unambiguously stated:

> "Finally, it is well established in this state that fine line decisions involving questions of constitutional law, rights and privileges, are best not decided in the forum of the district court and at this level. This Court therefore elects to follow the clear statutory law of this state ..."

The issues were not fully litigated and decided, but were expressly avoided.

The vague principle of comity should not be allowed to stand in the way of a federal action for relief under 42 U.S.C.

§§ 1983 where the state judiciary to which comity would offer deference, respect, and good will is the same entity alleged to have committed the unconstitutional deprivation of rights. A federal forum must be provided in such a case. See Averitt, "Federal Section 1983 Actions After State Court Judgment," 44 Colo. L. Rev. 191 (1972). To bar Appellant from federal court on the ground that she has elected a state remedy where her dissolution action could only be brought in the state court would be to draw an unreasonable distinction between those who seek redress after filing the state action and those who proceed to federal court in a direct attack on the statute.

It could be argued that the state disposition of the federal Constitutional issues should be given res judicata effect by the federal district court, but that

ignores Federal Rule of Civil Procedure 8 (c) which requires that res judicata be pleaded as an affirmative defense. Appellee has never raised the question and has effectively waived any such claim. In addition, for res judicata to apply, it is necessary that the issue or claim to be precluded has been fully litigated and was necessary to the judgment, Commissioner v. Sunnen, 333 U.S. 591, 92 L. Ed. 898 (1948). Here, the state court gave only a casual consideration to the Constitutional issues and expressly declined to make a final determination. See, e.g., Jackson v. Official Representatives, 487 F. 2d 885 (CA 9 1973).

It has not been finally determined whether the usual rule of res judicata barring federal court relitigation of issues decided by state courts should be applied in actions under 42 U.S.C. §§ 1983. Florida State Board of Dentistry v. Mack,

430 F. 2d 862 (CA 5 1970), cert. den., 401 U.S. 960, 91 S. Ct. 971 (1971) (White, J. and Burger, C. J., dissenting), citing Brown v. Chastain, 416 F. 2d 1012, 1014 (CA 5 1969) (Rives, J. dissenting). Appellant's local circuit court of Appeals has suggested that res judicata may not bar a proper claim for relief under §§ 1983. Jensen v. Olson, 353 F. 2d 825 (CA 8 1965).

In light of this lack of judicial guidance and of the fact that neither Appellee nor any of the three members of the lower court detected this issue, if a new or clearer rule on the effect of state judgments on federal §§ 1983 actions is to emerge, Appellant should have the same relief from adverse effect allowed the appellant in England v. Louisiana Medical Examiners, 375 U.S. 411, 422, 11 L. Ed. 2d 440, 449 (1964).

Section 1983 of 42 U.S.C. is intended

to provide individuals with a swift and unfettered form of redress from deprivation of federal Constitutional rights under color of state law. It contemplates the possibility that such rights may be infringed by a state judiciary and that a federal forum must be available for relief:

> "The very purpose of Section 1983 was to interpose the federal courts between the State and the people, as guardians of the people's federal rights --- to protect the people from unconstitutional action under color of state law, 'whether such action, be executive, legislative, or judicial'. Ex Parte Virginia, 100 U.S. at 346, 25 L. Ed. 676." Mitchum v. Foster, 407 U.S. 225, 242, 92 S. Ct. 2151, 2162 (1972).

To say that a federal forum is unavailable under res judicata because the §§ 1983

defendant is a state court is to render §§ 1983 useless against unconstitutional judicial action. Just as rules of state court finality must be disregarded in federal habeas corpus actions in order to maintain a critical lifeline for the protection of fundamental individual liberties, so must the procedure attending §§ 1983 actions be kept free of debilitating constraints.